Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

ESTATE OF TOMMY SMITH, *et. al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Kentucky Supreme Court reinstated $15 million in punitive damages in this product liability action based on an alleged defect in a motor vehicle designed a quarter century ago. The reinstated award is five times larger than the compensatory award, 18 times larger than the civil fine available under federal law for a nationwide fleet of defective vehicles, 1,000 times larger than the maximum criminal penalty arguably available under State law, and—as of the date of the trial—more than twice as large as the *aggregate* of all punitive verdicts approved on appeal in Kentucky history. The questions presented are:

1. Whether the court below erred in holding, in direct conflict with decisions of other State courts of last resort and federal courts of appeals, that punitive damages jury instructions that altogether fail to guide the jury's discretion—including failing even to identify the limited purposes those damages serve—are consistent with procedural due process.

2. Whether the court below erred, in conflict with *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002), in affirming the trial court's refusal to instruct the jury that it could not inflict punishment based upon the out-of-state sales of the product at issue or for the purpose of changing the defendant's out-of-state behavior.

3. Whether, in reinstating an unprecedented verdict to punish an automaker for a 25-year old design feature that the applicable federal safety agency has repeatedly examined and declined to find defective, that comported with industry custom and practice, and that numerous juries throughout the country have found non-defective, the court below improperly nullified the three excessiveness guideposts articulated in *BMW* and produced an award that violates due process.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, Brenda Smith, Kristen Smith (by and through her next friend, Brenda Smith), Sand Hill Energy, Inc., and Mid-East Ford Mercury, Inc. are parties to the case.

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company ("Ford") respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Kentucky, App. 1a, is reported at 83 S.W.3d 483. The opinion of the Court of Appeals, App. 60a, is unreported. The judgment of the trial court and its post-trial orders, App. 65a, are unreported.

JURISDICTION

The opinion of the Supreme Court of Kentucky was issued on May 16, 2002. The Supreme Court of Kentucky denied Ford's timely petition for rehearing on September 26, 2002. On December 3, 2002, Justice Stevens granted Ford's application for an extension of time in which to file a petition for a writ of certiorari on or before January 21, 2003. Order No. A455 (Dec. 3, 2002) (Stevens, J.). This Court has jurisdiction to review the final judgment of the Kentucky Supreme Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST., amend. XIV, § 1.

STATEMENT OF THE CASE

This petition, like the petition in *Ford Motor Co. v. Romo*, also filed today, arises from a wrongful death action in which a then-unprecedented sum of punitive damages was awarded against the manufacturer of an allegedly defective vehicle designed a quarter of a century ago. Here, the jury awarded respondents $3 million in compensatory damages and $20 million in punitive damages. The Court of Appeals reversed, but the Kentucky Supreme Court, by a 4-3 margin, reinstated $15 million in punitive damages. The three dissenting Jus-

tices opined that "[i]t is now clear that the majority of this Court is incapable of enforcing the constitutional restraints against excessive punitive damages verdicts in this jurisdiction," App. 54a, and that this case "begs for further review by a Court that is more interested in Due Process of law than in the redistribution of wealth." *Id.* at 55a.

1. On September 2, 1993, Tommy Smith died working at a mining site while unloading explosives from a trailer onto a 1977 Ford pickup owned by his employer, Sand Hill Energy. App. 32a. No one witnessed the accident, but a short while later, Smith's supervisor, Wayne Napier, found Smith, unconscious, pinned between the trailer and the rear end of the pickup. *Id.* at 33a. Napier moved the vehicle away from the trailer, and tried, without success, to revive Smith. *Id.*

Respondents instituted a wrongful death action against Ford, alleging that a defect in the pickup's C-6 automatic transmission allowed the vehicle, which Smith had left running, to "migrate" from "hydraulic neutral," a point between park and reverse, into powered reverse while Smith was unloading the cargo. *Id.* at 39a. At trial, respondents relied heavily on their expert, Mel Richardson, who testified that the C-6 transmission was defective, that the defect caused Smith's death, and that an alternative design would have avoided the accident. *Id.*

Ford raised many defenses at trial. Ford challenged respondents' assertion that the C-6 transmission was defective. The defect asserted by respondents was based on a characteristic common, then and now, to transmissions industry-wide: that if a driver fails to make a proper shift into a "latched" park position, the transmission may be in "hydraulic neutral" and may, after some delay, move into powered reverse due to vibration forces from the engine. Tape 3, 13:51:16-13:52:33. Richardson recognized that such a mis-shift could be made on "[a]ny reasonable [transmission.]" Tape 1, 16:59:38.

Indeed, the main feature of Richardson's proposed alternative design was to move the point at which the vehicle

would not be in reverse *closer* to latch, so that a driver would have to shift even farther to ensure that the transmission would not remain in reverse. Tape 3, 13:59:57, 13:59:45-14:01:15. According to Richardson—who never built, tested, or published his alternative design, or even reduced it to a sketch[1]—his design would allow a vehicle to remain in reverse that otherwise might have been mis-shifted into hydraulic neutral. *Id.* at 13:59:45-14:01:15. Ford's experts countered that Richardson's design would have, on balance, caused more accidents than it would have avoided. Tape 9, 9:18:49-9:20:42, Tape 11, 11:49:10-11:50:24. They testified that, because the point of release into hydraulic reverse would be closer to park, less severe disrepair than seen in this 1977 pickup would permit the transmission to move into powered reverse even when shifted fully into park latch. *Id.*

Ford also argued that, under Kentucky law, it was not liable because the 1977 pickup was not "used in its original, unaltered and unmodified condition." Ky. Rev. Stat. § 411.320. At the time of the accident, the pickup—which was more than 16 years old and had been driven more than 143,000 miles—was in a deplorable state of disrepair. The prior owner of the pickup had made a number of improper modifications and repairs, and had failed to maintain it in proper working condition. Tape 5, 13:24:16-13:26:37. After the accident, the U.S. Mine Safety and Health Administration ("MSHA") fined Sand Hill for operating an unsafe vehicle. *Id.* at 15:30:48; Tape 7, 10:01:27-10:04:21. The MSHA found that parts vital to the operation of the transmission

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[1] Ford challenged, in both pre- and post-trial motions, the admissibility of Richardson's expert testimony. The Fourth Circuit, in a case involving similar testimony by Richardson, found that his "speculative testimony, largely unsupported by scientific testing, was insufficient to establish [a defect]." *Babin v. Yale Materials Handling Corp.*, No. 94-1537, 1995 WL 115857, at *4 (4th Cir. Mar. 20, 1995) (unpublished op. And a federal district court in West Virginia held in a similar case that Richardson's testimony "finds no independent support in the record [and] must be viewed as pure speculation." *Martin v. Ford Motor Co.*, No. 2:96-1945, slip op. at 91-20, 22 (S.D.W. Va. Feb. 6, 1998).

were broken, misaligned, worn, or loose. Others had been replaced with makeshift parts. Tape 5, 14:28:11-14:33:02. The transmission, as well as the engine, had been entirely rebuilt. Tape 11, 11:23:59. Dirt, debris, and corrosion made it difficult to move the gearshift. Tape 10, 7/8/97, 9:53:16. The T-bolts, the flange casting, and the insert plate in the transmission were dangerously loose, and the shift linkage was out of adjustment. Tape 7, 09:59:36. The parking brake, designed to protect against unattended movement, was inoperative. *Id.* Richardson admitted that he had "only seen one" transmission "as poorly maintained." Tape 1, 15:35:18.

Ford also challenged respondents' showing of causation, which was based purely on Richardson's testimony. Richardson admitted on cross-examination that he could not discount the gross disrepair of the pickup as the equally likely cause of the rearward movement. *Id.* at 16:55:22; Tape 3, 16:01:03. In all the years the prior owner had used the truck, it had never unexpectedly moved rearward. Tape 5, 6/26/97, 14:27:15. As the dissent concluded, "it would be incredible that the 'park-to-reverse' phenomenon would manifest itself for the first time on September 2, 1993, sixteen years and 143,000 miles after the vehicle was manufactured." App. 40a. Rather, Ford's experts testified that, in all probability, Smith shifted fully into latched park, but that the breakage, misadjustment, looseness, and wear in the transmission system—and not any asserted defect—caused the transmission to move from a *full* latched park position into reverse. Tape 8, 16:04:41; Tape 11, 11:38:00. In fact, the MSHA's inspection revealed that, even after the gearshift was placed fully into park—where even respondents conceded the asserted defect would not have caused "migration" into reverse—the pickup nevertheless moved rearward. Tape 7, 09:47:57; App. 39a.

On this record, the jury found the transmission defective. The jury further found Ford 100% responsible, and both Smith and Sand Hill 0% responsible, despite the fact that the

court had ruled Sand Hill negligent as a matter of law. The jury awarded $3 million in compensatory damages. App. 1a.

Respondents also sought punitive damages. Respondents introduced no evidence that Richardson's design would have in any way increased Ford's manufacturing costs or reduced its profits on sales on vehicles with C-6 transmissions. Tape 15, 7/16/97, 17:05:18. Instead, over Ford's due process objection, respondents relied upon nationwide statistics relating to the sale of Ford vehicles containing C-6 transmissions: "6,500,000 or 7,000,000" vehicles with C-6 transmissions on the roads nationwide, "19,000 or 23,000" total park-to-reverse incidents nationwide, and "200" deaths nationwide. Tape 13A, 11:28:45-11:29:95; Tape 14, 15:34:47-15:35:44; Tape 15, 16:53:57, 16:56:28. In his closing, respondents' counsel argued that "hundreds" of people had been killed and asserted that "millions and millions of vehicles already on the road * * * are backing up and running over people and causing death and destruction." Tape 15, 16:53:57-16:56:28, 17:04:17. Respondents' counsel also argued, over Ford's objection, that the amount of a punitive damages award was "totally discretionary with you." Tape 13A, 11:23:48; Tape 15, 17:00:40-17:01:49, 17:05:18; 17:05:28. Respondents' counsel suggested that the jury could award "$1, $500,000,000, whatever you want." *Id.* at 17:05:18.

The trial court, over Ford's due process objections, refused numerous instructions that would have cabined the jury's discretion to punish Ford. The court refused to instruct the jury that it could award punitive damages only if Ford had no arguably legitimate reason for designing the product as it did, and that punitive damages were not appropriate if reasonable people could disagree about whether the product was defective. *See* Ford's Appendix, Ky. Ct. of App., Tab 15. The court refused to admonish the jury that Ford could be punished only for conduct having "an impact" on Kentucky, that the jury could not punish Ford based on vehicle sales in other States, and that punitive damages could not be

awarded for the purpose of changing Ford's conduct outside Kentucky. *Id.* The court also declined to instruct the jury that, in determining the amount of punitive damages, the jury should consider, among other factors, Ford's compliance with industry custom. *Id.* And the court refused even to instruct the jury that the award of punitive damages must be limited to the purposes those damages serve: to punish wrongdoing and deter similar wrongdoing in the future. *Id.*[2] The jury awarded $20 million in punitive damages—equivalent to $100,000 for each of the 200 nationwide deaths emphasized by respondents' counsel.

Ford moved for judgment notwithstanding the verdict or for a new trial, challenging on due process grounds respondents' use of Ford's out-of-state sales of vehicles with C-6 transmissions as a basis for punishment, the court's punitive damages instructions, and the amount of the award itself. *See* Ford's Memorandum of Law, July 28, 1997, at 61-77.

Tracking the three guideposts this Court identified in *BMW*, Ford argued that the $20 million award was unconstitutionally excessive. In terms of reprehensibility, the question of where to place the point of hydraulic release on a spectrum ranging from 0% to 100% represented precisely—indeed, literally—the kind of "line-drawing" decision, *BMW*, 517 U.S. at 579, an automobile manufacturer must always make in choosing among competing designs. Thus, Ford argued that the case involved, at most, a good faith disagreement between Richardson, on one hand, and Ford, the federal government, the domestic automobile industry, and the vast majority of other civil juries, on the other, concerning the proper placement of the hydraulic release point. The National Highway Transportation and Safety Administration ("NHTSA"), after its "largest and most difficult and complex investigation ever conducted," *Center for Auto Safety, Inc. v. Lewis*, 685 F.2d 656, 663 (D.C. Cir. 1982), declined to find

[2] The instructions approved by the trial court are set forth in the judgment, *see* App. 65a.

that the C-6 contained a safety-related defect—a decision reaffirmed on several occasions over the course of ten years. Tape 14, 13:44:04-15:16:24. It was also undisputed at trial that the C-6 transmission at issue conformed to then-existing industry standards; in fact, even today, as then, all automatic transmissions may be mispositioned between park and reverse and, thus, may experience unintended rearward movement. Tape 13A, 11:13:54, 11:40:51. And Ford noted that juries in fifteen States (including Arkansas, California, Florida, Iowa, Louisiana, Michigan, Mississippi, Missouri, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas), facing allegations similar to those made by respondents below, had concluded not only that punitive damages were unwarranted, but that Ford's automatic transmissions, including the C-6, were not defective *at all*.

Ford also argued that the $20 million punitive award did not bear a reasonable relationship to the already large $3 million compensatory award. Finally, Ford argued that no comparable penalty prescribed by the Kentucky legislature, or even by the United States Congress for a nationwide fleet of vehicles, placed Ford on fair notice of the possibility of a $20 million punitive verdict. The trial court denied Ford's post-trial motion, App. 75a, and entered judgment. *Id.* at 65a.

2. The Court of Appeals of Kentucky reversed the trial court's judgment on state law grounds. *Id.* at 63a. The Court of Appeals also held that, under this Court's precedent, "instructions to the jury must define the purpose of punitive damages as punishment to the wrongdoer and as a deterrent to wrongdoers and others from such activities in the future," and directed the trial court on remand to instruct the jury on the purposes served by punitive damages. *Id.* at 64a.

3. By a 4-3 margin, the Kentucky Supreme Court, in a plurality decision, reinstated the judgment of the trial court for $3 million dollars in compensatory damages and reinstated the punitive award to the extent of $15 million. In approving the punitive damages instructions, the plurality noted

that "a practice of long-standing in this Court's jurisprudence, indeed a venerated practice, is the giving of 'bare bones' instructions." *Id.* at 14a. Addressing Ford's argument that the instructions failed to identify the limited purposes of punitive damages, the court held that "counsel *for the Estate* reminded the jury time and again that the purpose of punitive damages was to punish wrongdoing." *Id.* at 15a (emphasis added). The court implicitly rejected Ford's argument that due process requires a separate instruction concerning the prohibition against punishment for extraterritorial conduct having no impact on the State, as well as Ford's substantive challenges to respondents' use of vehicle sales outside of Kentucky as a basis for punishment.

The court also held that a $15 million punitive exaction was not excessive under the three *BMW* guideposts. The court found Ford's conduct "substantial[ly]" reprehensible. *Id.* at 17a. In addressing Ford's argument that the C-6 comported with industry custom, was reviewed by NHTSA and not found defective, and was designed in good-faith, the court held that "by Ford's own engineers and through many consumers, some of whom were maimed or killed, Ford was forcefully informed that its transmission was dangerous." *Id.* The court also approved the 5:1 ratio of punitive-to-compensatory damages, holding that, in light of the "degree of harm" Smith suffered, a "substantial multiple would be required" to "achieve any real punishment." *Id.* at 17a-18a. In assessing *BMW*'s "comparable penalties" guidepost, the court rejected Ford's reliance on the application of State and federal *legislative* penalties, instead holding the third *BMW* guidepost satisfied solely by charging Ford with notice of several punitive damages verdicts, within and outside Kentucky, and approved anywhere between five and 22 years *after* the production of the C-6 transmission in the 1977 pickup. *Id.* at 19a.

Justice Cooper, joined by Justices Graves and Johnstone, dissented. The dissent would have reversed the jury's find-

ing of liability on several grounds, including, *inter alia*, the absence of any reasonable alternative design. *Id.* at 40a. The dissent would also have reversed as to the failure of the trial court to instruct the jury on the purpose of punitive damages, *id.* at 51a, and as to the amount of punitive damages the jury ultimately awarded. *Id.* at 52a-55a. The dissent concluded that Ford's alleged misconduct, if any, could not justify a $15 million award, particularly given NHTSA's decision not to order any recall of vehicles containing the C-6 transmission. Justice Cooper summarized:

> In its haste to place its imprimatur on this outrageous verdict by a Clay County 'runaway' jury and, presumably, to redistribute the wealth of an out-of-state corporation with requisite deep pockets to stimulate the economy of eastern Kentucky, the majority opinion ignores the facts of the case * * * and the * * * Due Process Clause[] of the Fourteenth Amendment as interpreted by the United States Supreme Court.

Id. at 32a. "Hopefully," Justice Cooper concluded, "this will not be the last Court to evaluate what has occurred in this case." *Id.* at 55a.

REASONS FOR GRANTING THE WRIT

This case—like *Ford Motor Co. v. Romo*, also filed today—raises recurring questions concerning the administration and award of punitive damages in product liability cases, questions that have deeply divided and confused the lower courts, and that threaten to nullify *BMW* and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). The Court is addressing some aspects of these questions in *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, and, at a minimum, the Court should hold this petition pending resolution of *State Farm*. But this case, both alone and in conjunction with *Romo*, presents the Court with additional, important questions concerning the procedural and substantive limitations due process imposes upon the administration of punitive damages. Plenary review is therefore warranted.

I. THIS COURT SHOULD DECIDE WHETHER JURY INSTRUCTIONS THAT FAIL TO GUIDE A JURY'S DISCRETION TO AWARD PUNITIVE DAMAGES SATISFY DUE PROCESS.

Citing Kentucky's tradition of "bare bones" jury instructions—which discourages trial courts from providing meaningful guidance and presumes that arguments of counsel may properly substitute for more detailed instructions—the Kentucky Supreme Court reinstated a multimillion dollar punitive damages verdict awarded after the trial court approved instructions that failed even to identify the purposes served by punitive damages, much less the limitations inherent in those purposes. That decision implicates two square conflicts in authority. The first is a conflict with the decisions of numerous other courts holding that, under *Haslip*, juries *must* at least be instructed on the limited purposes for which punitive damages may be imposed. The second is a conflict with two decisions of this Court flatly rejecting the Kentucky judicial practice, followed here, of allowing arguments of counsel to substitute for constitutionally required jury instructions.

1. "[P]roper jury instruction" is "a well-established and, of course, important check against excessive [punitive] awards." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 (1994). "Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct." *Haslip*, 499 U.S. at 15. "Beginning with the first punitive damages awards, in England in 1763 and in the United States in 1784, courts have instructed juries at common law to consider the egregiousness of the wrongful act and the need to deter similar conduct. Today, courts continue to instruct juries on the dual purpose of punitive damages." Janet A. Mesrobian, *Constitutional Law—Judicial Review of Punitive Damages Necessary To Comport With Due Process*, 29 Suffolk U. L. Rev.

1181, 1183-84 (1995).

Consistent with this settled tradition,[3] this Court strongly suggested in *Haslip* that punitive damages may be awarded consistent with due process only where the jury has been specifically instructed that its "discretion" to award punitive damages is "confined to deterrence and retribution, the state policy concerns sought to be advanced." 499 U.S. at 19. Without explicit guidance mooring punitive damages to the limited state interests they seek to further, it is impossible for jurors to have any conceptual understanding of what it is they are being asked to award, and why they are being asked to award it. *See id.* at 18-19 (jury instructions that "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory * * * reasonably accommodated [the defendant's] interest in rational decisionmaking").

Threadbare instructions undermine the State's "interest in meaningful individualized assessment of appropriate deterrence and retribution," *id.* at 19, because the jury cannot rationally determine an amount "appropriate" to meet those purposes, including determining whether *any* damages beyond compensatory amounts are required to fulfill the State's interest in deterrence and punishment. *See infra* at n.11. Thus, a scheme that fails to "confine" a jury's discretion to award punitive damages violates due process. *See also BMW*, 517 U.S. at 602 (Scalia, J., dissenting) (if the "precise state interests pursued" are "the most fundamental determinant of an award, one would think that due process would require the assessing jury to be *instructed* about them") (internal quotations omitted); *Bankers Life & Cas. Co. v.*

[3] "[T]raditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430; *Haslip*, 499 U.S. at 30 (state civil trials must operate "according to the settled course of judicial proceedings"); *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'").

Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (failure to give appropriate instructions on punitive damages "appears inconsistent with due process").

The decision below conflicts with a raft of federal- and state-court decisions holding that instructions must, under this Court's precedent and as a matter of due process, cabin the jury's discretion to award punitive damages by defining their legitimate purposes. *See Baker v. Gen. Motors Corp.*, 86 F.3d 811, 818 (8th Cir. 1996) ("[T]he jury was allowed to award aggravating circumstance damages without being given a definition of what those damages entailed. This lack of guidance rendered the jury instructions unconstitutionally vague and violated GM's right to due process."); *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1045 (Wyo. 1998) (due process "demands that we articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review"); *cf. Dunn v. HOVIC*, 1 F.3d 1371, 1380 (3d Cir. 1993) (approving instructions that, in part, defined purposes of punitive damages); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097-98 (5th Cir. 1991) (same); *Am. Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1457 (11th Cir. 1991) (same); *Gamble v. Stevenson*, 406 S.E.2d 350, 353-54 (S.C. 1991) (same). Certiorari should be granted to resolve this conflict.

2. The Kentucky Supreme Court held that no instruction on the purposes of punitive damages was required because, under Kentucky's tradition of "bare-bones" jury instructions, the arguments of counsel are an adequate substitute. That holding is contrary to two of this Court's decisions specifically rejecting that Kentucky practice. *See Carter v. Kentucky*, 450 U.S. 288, 304 (1981) (requiring instruction that criminal defendant's decision not to testify could not be used against him); *Taylor v. Kentucky*, 436 U.S. 478, 488-89

(1978) (requiring instruction that criminal defendant was presumed innocent). As this Court explained in *Taylor*: "[A]rguments of counsel cannot substitute for instructions by the court * * *. It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." 436 U.S. at 488-89. The assumption of the Kentucky Supreme Court that Ford's rights were safeguarded by arguments of counsel—*plaintiffs' counsel* no less—cannot be reconciled with *Taylor* and *Carter*. Certiorari is warranted to resolve this conflict as well.

3. "Punitive damages pose an acute danger of arbitrary deprivation of property" because "juries [may] use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg*, 512 U.S. at 432.[4] The risk—inherent in all punitive damages cases—that punishment will be imposed for arbitrary or forbidden reasons was realized here. Respondent's counsel accurately informed the jury that, under the trial court's instruction, its discretion was *unlimited*, and that it could award "$1 or $500,000,000," whatever it wanted. Lacking any meaningful guidance concerning the purposes of punitive damages, there is every reason to believe that the jury here inflated its punitive award based on Ford's presumed wealth and its out-of-state residence. As the trial court recognized, "you can search the United States over and not find anybody that didn't know about Ford Motor Company." Tape 13A, 10:01:43. But punitive damages cannot be premised on a defendant's name recognition, or on the attributes (such as size, wealth, and multi-state presence) with which name recognition is correlated. Moreover, where, as here, there has been no showing that the defendant profited *at all* from the challenged conduct, the risk that this unguided jury based its $20 million punitive sanction on arbitrary or impermissible

[4] *See also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality) (discussing risk that punitive damages may be "influenced by prejudice against large corporations" particularly "when the defendant is a nonresident").

considerations is all the more stark.[5]

For these reasons, meaningful jury instruction is a necessary due process safeguard, independent of excessiveness review under *BMW*. *See TXO*, 509 U.S. at 467 (Kennedy, J., concurring) ("When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award."); *Haslip*, 499 U.S. at 43-44 (O'Connor, J., dissenting) ("*Post hoc* review tests only the amount of the award, not the procedures by which that amount was determined * * *. Any award of punitive damages rendered under these procedures, no matter how small the amount, is constitutionally infirm."). The principal institution representing the plaintiffs' bar agrees. *See Amicus Curiae* Brief of the Assoc. of Trial Lawyers in America, *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, Oct. 17, 2002, at 25 ("clear and precise jury instructions are needed for fair and reasonable jury awards of punitive damages"); *id.* at 26 ("unlimited jury discretion and inadequate guidance from the court may invite extreme results") (quoting *Haslip*, 499 U.S. at 18).

This Court has, since *Haslip*, granted certiorari to address two components of the due process limits imposed on punitive damages: the adequacy of judicial review, *see Oberg*, 512 U.S. at 420, and excessiveness review under *BMW*. But the Court has not reviewed a case concerning the adequacy of

[5] Ford's wealth alone cannot justify an award of punitive damages. *See, e.g., BMW*, 517 U.S. at 585 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business."); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.18 (8th Cir. 1995) (opinion of retired Justice White) ("a defendant's wealth cannot alone justify a large punitive damages award"). Indeed, as discussed in more detail in the *amicus* brief filed by the Business Roundtable in *State Farm*, a corporate defendant's wealth is irrelevant to both punishment and deterrence. *See Amicus Curiae* Brief of the Business Roundtable, *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, Aug. 19, 2002, at 3-25.

jury instructions—a third component of due process. *See Haslip*, 499 U.S. at 20; *Oberg*, 512 U.S. at 420 (holding that past punitive damages decisions "strongly emphasized the importance of the procedural component of the Due Process Clause"). Yet *Haslip* recognized that ensuring a properly informed jury is logically the *first* step in ensuring both the procedural and substantive fairness of punitive damages awards. Many courts have taken *Haslip*'s warning in that regard seriously; the court below did not. Because of the serious and continuing risk that uninformed juries will award or inflate punitive damages for arbitrary and forbidden reasons, this Court should grant certiorari to clarify, and reiterate, this essential component of the due process limits on punitive awards.

II. THIS COURT SHOULD DECIDE THE PROCEDURAL AND SUBSTANTIVE SCOPE OF *BMW*'S PROHIBITION OF EXTRATERRITORIAL PUNISHMENT.

In *BMW*, this Court held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW*, 517 U.S. at 572. The *BMW* Court left open the question of "whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State." *Id.* at 573 n.20. And the Court also held that evidence of out-of-state conduct "may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." *Id.* at 574 n.21. The decision below implicates two distinct conflicts among the courts relating to extraterritoriality. The first involves the need for clear instructions informing the jury as to the permissible bases on which it may consider evidence of out-of-state conduct. The second involves the scope of punishment for out-of-state conduct permissible under *BMW*.

1. Respondents relied at trial extensively on nationwide statistics relating to Ford's transmissions, and urged punishment on the ground that "millions and millions of vehicles

already on the road * * * are backing up and running over people and causing death and destruction." *See supra* at 5. The decision below affirming the refusal to provide an extra-territoriality instruction under these circumstances directly conflicts with the decisions of other lower courts, including the Ninth and Tenth Circuits. As the Ninth Circuit recently explained in a case involving remarkably similar facts:

> The evidence focused on the number of vehicles Ford sold nationally, and the number of parking brake failures reported nationally. The national evidence was not limited by any jury instructions or admonitions to limit its relevance to reprehensibility. The jury was permitted, despite Ford's request for instructions to correct this error, to award damages to vindicate the interests of all Ford pickup truck buyers everywhere. In essence, the jury was asked to measure damages by Ford's harm to the whole country.

White v. Ford Motor Co., 312 F.3d 998, 1015 (9th Cir. 2002); *see also Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 637 (10th Cir. 1996) (noting that, in case focusing on out-of-state conduct, trial court should "instruct the jury to restrict its consideration to [the State's] interest in protecting its own citizens and its own economy") (internal quotations omitted); *Geressy v. Digital Equip. Corp.*, 950 F. Supp. 519, 524 (E.D.N.Y. 1997) (approving instruction that the jury could consider "what is reasonably required to vindicate New York State's legitimate interests in punishment and deterrence, if any," but that it was "not authorized to impose punitive damages to protect people outside the State of New York").

The need for an extraterritoriality instruction is particularly acute given *BMW*'s recognition that out-of-state conduct having no impact on the State may still be relevant to the jury's consideration of "reprehensibility." That makes it likely that—in a typical product-liability action—evidence of the defendant's out-of-state behavior having no impact on the

forum state will be introduced at trial. Yet the distinction between conduct offered to show reprehensibility and conduct offered as a basis for punishment is a subtle one that is not easily appreciated by a lay jury, and clear instructions are thus critical in confining jury discretion to its lawful sphere. The Court should grant certiorari to establish the importance of proper instructions in preventing extraterritorial sanctions.

2. For similar reasons, the decision below implicates the *substantive* scope of *BMW*'s extraterritoriality prohibition. Counsel for respondents vigorously argued to the jury that it should punish Ford for millions of vehicle sales occurring outside of, and otherwise having no connection to, Kentucky. And the trial court did not inform the jury that those sales were relevant for some, but not all, purposes. Thus, while it is impossible to know precisely what motivated the jury to levy $20 million in punishment for a vehicle design feature that was indisputably the product of good-faith decisionmaking and that, according to the evidence, brought Ford no profit at all, the circumstances indicate that the jury's excessive amount could only have been based on the national product distribution and incident figures with which the jury was provided. As the Ninth Circuit concluded in *White*: "The [trial] court's refusal to limit the jury to consideration of Nevada's interests, combined with the plaintiffs' lawyers exhortations * * * compels us to conclude that the jury was permitted to engage in a due process violation * * * when it arrived at its punitive damages award." 312 F.3d at 1020 (internal quotations omitted). The decision below is irreconcilable with *White*.

3. In *BMW*, this Court left open the question of "whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State." 517 U.S. at 573 n.20. Attempting to capitalize on that open question, respondents' sole justification below for demanding extraterritorial punishment was that the asserted conduct (*viz.*, sales of vehicles with the C-6 design) was "not lawful anywhere." Respon-

dents contended, at the broadest level of abstraction, that "it is inconceivable that any state sanctions or approves of a manufacturer placing a defective automobile into the stream of commerce to travel the highways of the United States. Producing defective designs likely to cause serious physical injury or death [is] not lawful anywhere." Br. of Estate of Tommy Smith, Kentucky Ct. of App., at 38. Other courts have embraced similar reasoning to approve extraterritorial sanctions. *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1253 (10th Cir. 2000) (rejecting extraterritoriality argument because "the manufacture of defective products is not a lawful activity in any of the jurisdictions where the other incidents occurred"); *Owens-Corning Fiberglas Corp. v. Ballard*, 739 So. 2d 603, 606 (Fla. 4th Dist. Ct. App. 1998) ("In contrast, where the defendant's conduct is considered *tortious* in all 50 states, as here, the same due process concerns implicated in *BMW* do not arise.") (emphasis added).

Certiorari should be granted to make clear that a State does not have license to regulate and punish conduct having no impact on the State on the ground that the conduct is putatively "unlawful" in other states. The decision below compounds an existing split of authority among the lower courts concerning whether *BMW* categorically bars punishment for extraterritorial conduct even when the conduct is deemed unlawful everywhere.[6] That conflict alone warrants review. But it is especially important for the Court to make clear that States may not punish for *any* kind of extraterritorial conduct

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[6] *Compare White*, 312 F.3d at 1018 (extraterritorial prohibition applies "whether the extraterritorial conduct is lawful or not"); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999) ("The Supreme Court has instructed that punitive damages must be based upon conduct in a single state—the state where the tortious conduct occurred"); *and Geressy*, 950 F. Supp. at 521 ("punitive damages can not be awarded to punish or deter acts in other states which do not affect the forum state"); *with Smith*, 214 F.3d at 1253 (rejecting extraterritoriality argument because "the manufacture of defective products is not a lawful activity in any of the jurisdictions where the other incidents occurred"); *and Ballard*, 739 So. 2d at 606.

in non-intentional tort, product liability cases such as this one, where highly generalized descriptions of conduct as "negligent," or a product as "defective," are often invoked as the basis for determining, in one fell swoop, the purported nationwide "lawfulness" of the specific alleged misconduct at issue. Such characterizations conflict with this Court's precedent. In *BMW*, this Court did not examine BMW's conduct with generalized reference to whether "consumer fraud" was unlawful everywhere, but, rather, with particular reference to the "patchwork of rules representing the diverse policy judgments of lawmakers in 50 States" on the *precise* conduct at issue. 517 U.S. at 570.

Similarly, respondents' highly generalized description ignores that the *precise* conduct at issue here—the sale of vehicles with C-6 transmission—has been determined lawful in many other jurisdictions in jury trials. The fact that this particular jury found that the C-6 transmission was defective (and, in turn, warranted enormous punishment) did not authorize the jury effectively to declare sales of vehicles with C-6 transmissions "unlawful everywhere." To the contrary, although of course no state permits the sale of defective products, "it is up to each jurisdiction to make that determination for itself' through its own jury trials. *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561 (Ind. Ct. App. 1999).

The decision of whether, and how severely, to punish non-intentional torts is an important policy choice to be made by each State. *See BMW*, 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case"); *Smith v. Wade*, 461 U.S. 30, 59-60 (1983) (Rehnquist, J., dissenting) (noting differences in state punitive damages schemes). *BMW* thus must be read "broadly enough to suggest that [each State] must leave some room within which the other states can exercise their own interests in defining the precise extent of and in deterring wrongful conduct." *Ace v. Aetna Life Ins. Co.*, 40 F. Supp.

2d 1125, 1133 (D. Alaska 1999); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic").

This case highlights the importance of such policy choices. The court below held that Ford's compliance with industry standards, and the fact that the federal government had investigated and failed to require any safety-related recall of the precise design feature challenged by respondents, did not preclude the award of punitive damages. That holding itself conflicts with the conclusions of numerous other courts holding that punitive damages are altogether barred when the defendant has complied with industry standards or federal regulations.[7] No principle of comity or sovereignty permits Kentucky to approve an award that effectively decides for its sister States that *their* companies should be severely punished under such circumstances.

This issue is a matter of enormous importance in modern tort litigation. It is particularly important to manufacturers, whose products are almost invariably sold and used in all 50

[7] *See, e.g., Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award where defendant's decision not to install leg guards on its motorcycles was consistent with that of other manufacturers); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (punitive damages unavailable when "record fails to establish that the defendants did anything other than conform to industry standards" in producing product); *Nigro v. Remington Arms Co.*, 637 A.2d 983, 989-90 (Pa. Super. Ct. 1993) ("Compliance with industry standard and custom tends to * * * negate an inference of wanton indifference to the rights of others."); *see also Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (evidence found insufficient to support punitive damages finding of "wanton" conduct in light of defendant's compliance with federal standards); *Boyette v. L.W. Looney & Son, Inc.*, 932 F. Supp. 1344, 1348 (D. Utah 1996) (dismissing punitive damages claim where defendant complied with federal regulations); *Chrysler Corp. v. Wolmer*, 499 So.2d 823, 826 (Fla. 1986) (award of punitive damages vacated where the alleged injury-causing defect was in compliance with applicable federal standards).

States and who are subject to a "patchwork" of regulations and state law rules. *BMW*, 517 U.S. at 570. In the wake of *BMW*, enormous uncertainty exists concerning the limits on a jury's use of out-of-state conduct and effects to determine a punitive damages award. The decision below compounds that confusion. Certiorari should be granted.

III. REVIEW IS WARRANTED TO PROVIDE NEEDED GUIDANCE AS TO THE PROPER APPLICATION OF THE *BMW* GUIDEPOSTS TO PRODUCT LIABILITY ACTIONS.

As this Court stated in *BMW*, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. This Court's decisions have thus far applied that important fair notice requirement to defendants found to have engaged in *intentional* wrongdoing. *See TXO*, 509 U.S. at 468 (Kennedy, J., concurring) ("This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title."); *Haslip*, 499 U.S. at 14 (noting that case involved pattern of "intentional fraud"). But, as this case and *Romo* demonstrate, *non-intentional* torts pose an especially grave risk that a defendant will be punished for conduct it had a "good-faith basis for believing" was lawful. *BMW*, 517 U.S. at 580. Companies like Ford are constantly required to "establish the appropriate line," *id.* at 579, in designing their vehicles, calibrating competing safety risks (as here) or balancing safety with affordability and functional-

ity.[8] But here, as in *Romo*, the lower court misapplied all of the *BMW* guideposts to conduct that Ford plainly had a good-faith basis for believing was lawful. The error below is frequently committed in product liability cases, leaving manufacturers subject to massive, unwarranted sanctions that are imposed with all the predictability of a lightning strike.

A. The Decision Here (Like The Decision in *Romo*) Renders The Reprehensibility Guidepost Meaningless In Product Liability Cases.

When faithfully applied, the reprehensibility guidepost operates to fulfill the Constitution's assurance that defendants will have fair notice of what the law will do if a certain line is passed. No such fair notice function is served by the Kentucky Supreme Court's application of this important guidepost. To the contrary, by finding "substantial" reprehensibility in Ford's mere awareness of the safety tradeoffs posed by the C-6 transmission and alternative designs, the court below—like the courts in *Romo* and other cases—all but eviscerated the reprehensibility guidepost in product liability actions.

The court below concluded that Ford's conduct presented "substantial" reprehensibility because Ford was aware of the "dangerous propensities" of the C-6 transmission for "five or more years" before producing the pickup at issue. App. 17a. Yet the underlying evidence was simply that Ford's engineers were aware that the C-6 transmission—like all automatic transmissions—could permit park-to-reverse migration in cases of incomplete shifts (just as Ford engineers were aware that alternative designs could lead to even more mis-

[8] As Justice Breyer has noted, consumers will not pay enormous premiums for only marginal improvements in safety. Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 13-14 (1993); *see also* Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 Ky. L.J. 1, 88-89 (1985) ("Safety is important, but the manufacturer must also consider elements such as marketability, appearance, ease of operation * * * ease of manufacture, and economics of materials and labor.").

haps), and that "many consumers" had reported migration incidents to the company, some resulting in accidents and injuries. *Id.* This sort of awareness of a product's potential dangers will always be present where, as here, a manufacturer has made a good-faith attempt to minimize competing safety risks in finalizing the product's design. Indeed, under the Kentucky Supreme Court's approach, the most careful manufacturers—the ones whose engineers are most likely to identify and make reasoned judgments concerning product tradeoffs—are most likely to be tagged with "reprehensible" conduct when a lay jury disagrees with the engineers' design judgments.

The court's analysis thus fundamentally perverts *BMW*'s reprehensibility guidepost. The question of whether to place point of release into hydraulic reverse closer (as Richardson testified) or farther away (as Ford's experts testified) from the park position represents exactly the kind of "line-drawing," *BMW*, 517 U.S. at 579, an automobile manufacturer must make all the time in choosing among competing designs. The fact that there was a debate in the engineering and regulatory community over the proper placement of the point of hydraulic release in automatic transmissions should point against—strongly against—any finding of reprehensibility. This is particularly so here, where Ford's engineers were joined on their side of the debate by no less than the federal government, the rest of the domestic automobile industry, and the vast majority of other civil juries—facts that would have, in most jurisdictions, precluded any award of punitive damages. *See supra* at n.7.[9]

Against this background, nothing in the court's reprehen-

[9] Under the court's reasoning, NHTSA—which faces a statutory mandate requiring manufacturers to recall vehicles containing safety-related defects, *see* 49 U.S.C. §§ 30118-30120—also acted with "substantial[]" reprehensibility in declining to recall vehicles containing the C-6 transmission. The court's analysis thus subverts, and supplants, Congress's carefully crafted regulatory scheme, which balances the many complex factors that go into vehicle safety determinations.

sibility analysis suggests how Ford could possibly have had "fair notice," *BMW*, 517 U.S. at 574, *in 1977* that it would be subject to enormous punishment more than twenty years later for not adopting Richardson's never-built, never-tested, never-peer-reviewed, never-sketched—and potentially *more* dangerous—alternative design. It is one thing for a lay jury to conclude, years later, that Ford should have selected a different point of release, thus subjecting Ford to compensatory liability. It is an altogether different thing for a reviewing court to conclude, on the basis of little more evidence than that Ford was aware of an engineering debate over where the point of release should be placed, that the choice was not only legally erroneous, but so horrifically wrong that massive punishment is justified.

In finding substantial reprehensibility based purely on Ford's awareness that its product could cause serious harm, the court was also simply stating the obvious: that consumer products can and do cause serious injury and death. That unfortunate certainty, however, applies to all vehicles sold in this country, as well as to myriad other products, including bathtubs, bananas, baseballs, aspirin, and peanut butter. Indeed, "over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*." Breyer, *supra* at n.8, at 14 (internal quotations omitted). Yet no one would claim that a manufacturer of any one of those products should be subject to enormous punishment—indeed, any punishment—simply for making a good-faith election among competing designs that a lay jury later finds unreasonable. If awareness that some users of a product may suffer injury or even death is enough to warrant a finding of substantial reprehensibility, then the first *BMW* guidepost offers no limiting value at all in product cases, with every manufacturer in America subject to an eye-popping punitive damage award any time a jury disagrees *ex post* with the manufacturer's good-faith assessment of product design risks and benefits. *Cf.* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107, 116 (2001) (noting

the risk that a company's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim").

BMW did not propose such an empty reprehensibility standard. To the contrary, the Court held that conduct otherwise unlawful may *also* be particularly reprehensible when it involves "trickery and deceit" or "intentional malice," *id.* at 576, or a defendant that "persists in a course of conduct after it had been alleged unlawful * * *." *Id.* at 579. None of that is true here. What is true is that the jury disagreed with a design decision Ford plainly had every "good faith" reason to believe was lawful. *BMW*, 517 U.S. at 579. For that reason, the jury's disagreement does nothing to alter *BMW*'s conclusion that good faith line-drawing decisions evince diminished reprehensibility—not, as the court below held, "substantial" reprehensibility. If the jury's disagreement with Ford's good-faith design judgment constitutes all the "notice" Kentucky was willing to provide Ford that it could be hit with a $15 million sanction, then the decision below raises fundamental questions concerning the procedural fairness of Kentucky's punitive damages regime, as applied here. *See, e.g., Haslip*, 499 U.S. at 45, 54 (O'Connor, J., dissenting) (suggesting that an entirely discretionary punitive damages regime is void for vagueness reasons).[10]

Other courts have similarly drained the reprehensibility guidepost of any genuine meaning in product liability cases by focusing—to the exclusion of all other factors the *BMW* Court identified as bearing on reprehensibility—on a manufacturer's awareness that its product may cause harm. *See Romo* Pet. App. 35a & 38a (finding that design defects are tantamount to criminal manslaughter and thus necessarily "grossly reprehensible," regardless of other mitigating fac-

[10] A state law that permits a defendant to be punished *at all* where the defendant had reasonable grounds to believe its conduct was lawful raises serious due process concerns. *See generally Southwestern Telephone & Telegraph Co. v. Danaher*, 238 U.S. 482 (1915).

tors); *Clark v. Chrysler*, 310 F.3d 461, 482 (6th Cir. 2002) (finding negligent design reprehensible because it "resulted in the loss of life"); *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 840 (Ore. 2002) (reprehensible to market product "that *could* cause serious illness or death") (emphasis added). These cases illustrate the urgency of the need for this Court to clarify the role of *BMW*'s reprehensibility guidepost.

B. The Decision Below Guts The Ratio Guidepost.

The second guidepost is the "ratio" of the punitive award "to the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580. This "reasonable relationship" requirement "has a long pedigree," *id.*, tracing its roots to English statutes authorizing ratios of 1:1 (double damages), 2:1 (treble damages), or 3:1 (quadruple damages). *Id.* at 581 & n.33.

This Court has thus far considered the application of this guidepost only in cases involving intentional wrongdoing. *See supra* at 21. The *BMW* Court explained why ratios that approach or even exceed historical benchmarks—such as the 4:1 ratio the Court found "close to the line" in *Haslip*, 499 U.S. at 23-24—may nevertheless be permissible as a matter of due process: "[L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *BMW*, 517 U.S. at 582. High ratios may thus be necessary to promote the State's interest in punishment and deterrence in cases where intentional misconduct is likely to escape detection, or where an egregious act happens not to result in serious harm.

However, this Court has not applied the ratio guidepost to non-intentional torts involving serious personal injury. In precisely that category of cases, none of the justifications identified in *BMW* for high ratios will generally be present. To the contrary, the compensatory award will generally be

high and the injury—physical in nature—will virtually always be easy to detect. A high ratio will often be unnecessary to promote the State's interest in punishment and deterrence, and a much lower ratio may therefore be constitutionally required. As the *BMW* Court made plain, a "sanction * * * cannot be justified on the ground that it was necessary to deter future misconduct without considering whether *less drastic remedies* could be expected to achieve that goal." 517 U.S. at 584 (emphasis added). Accordingly, just as a high ratio may be permissible in a difficult-to-detect intentional tort claim, a low ratio may be excessive in an easy-to-detect non-intentional tort claim resulting in a multi-million dollar compensatory damage award. *See, e.g., Watkins v. Lundell*, 169 F.3d 540, 547 (8th Cir. 1999) (holding that "[t]he fact that the punitive damages award is *half* the compensatory damages does not save this from the requirements of due process") (emphasis added). [11]

Here, like the court in *Romo*, the court below eviscerated the ratio guidepost by concluding that, solely because the "degree of harm" suffered by Smith was high, a "substantial multiple would be required" to "achieve any real punishment." App. 17a-18a. That analysis, however, is exactly backwards under *BMW*: serious harm, coupled with the inability to escape detection, counsels against, not in favor of, a high ratio. And here, because respondents introduced *no* evidence showing Ford obtained any profit from its design decision, the compensatory award itself far outstripped any

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[11] Indeed, in some cases, the State's legitimate interests may be *fully* vindicated by a compensatory award itself. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory"); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332-33 (5th Cir. 1985) (deterrence "may be achieved without awarding exemplary damages" if compensatory damages are large); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (holding punitive damages unconstitutional in certain defamation actions because they are "wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions").

alleged financial gain resulting from the misconduct. This is yet another reason that a high ratio cannot be justified by reference to the State's legitimate interests in punishment and deterrence. *See* 2 American Law Institute, *Enterprise Responsibility for Personal Injury: Reporter's Study* 254-55 (1991) ("In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's overall wealth, but rather profit it realized from the particular tortious activity in question."). The Court should grant certiorari to provide guidance as to the proper application of the ratio guidepost in cases involving non-intentional torts.

C. By Finding Fair Notice In Jury Verdicts Rendered Years After The Conduct At Issue, The Decision Below Eviscerates the Comparable Fines Guidepost.

The third *BMW* guidepost requires "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct * * *." *BMW*, 517 U.S. at 583. This guidepost assures members of the public the clearest and most definitive notice of potential state punishment for wrongdoing. And because such penalties are established by the elected representatives of the people, reviewing courts are required to "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

The court below gave *no* deference to either the Kentucky legislature or the United States Congress. As discussed in *Romo*, at the time of trial here, the maximum fine imposed by the United States Congress specifically for knowingly selling an entire fleet of defective vehicles was $800,000. *See* 49 U.S.C. § 30165(a).[12] Further, the Kentucky legislature has

[12] Congress's selection of a maximum penalty for a fleet of vehicles reflects its authority to regulate nationwide conduct under the Commerce Clause. Kentucky, of course, may legislate only "with reference to its own jurisdiction * * *." *Bonaparte v. Tax Ct.*, 104 U.S. 592, 594 (1881).

enacted legislation specifically dealing with the criminal fines that may be assessed against corporations. Ky. Rev. Stat. § 534.050. For an offense defined by the penal code, the *maximum* penalty for *any* felony is $20,000 or double the amount of the corporation's gain from the commission of the offense, whichever is greater. *Id.* § 534.050(1)(a), 1(e). The maximum fine is the same for offenses defined outside the penal code where no specific corporate fine is specified *and where an individual who commits the offense can be imprisoned. Id.* § 534.050(2)(a), (2)(e).

As Ford argued below, its conduct was "not, of course, criminally sanctionable at all" under the laws of Kentucky. Ford Br. to Ky. S. Ct. at 51. Similarly, NHTSA had determined, after a comprehensive investigation, not to require any safety-related recall of vehicles containing C-6 transmissions. Under those circumstances, the third *BMW* guidepost dictated a small punishment for the conduct at issue. *See, e.g., FDIC v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) (fact that the conduct is not subject to criminal or civil fines suggests that defendant was not on notice that its conduct could give rise to substantial punishment); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997) (same).

Rather than focusing on the application of these statutory penalties, or even acknowledging the comparatively low ceilings set by those statutes, the court, in direct conflict with *Hamilton* and *Groom*, instead justified the award solely with reference to the amount of punitive damages awards in other cases. The court referred to several Kentucky verdicts awarding punitive damages in wholly unrelated contexts approximately twenty years after the C-6 transmission in this 1977 pickup was produced. The court also referred to several out-of-state verdicts against Ford, only one of which (approved a full 22 years after the C-6 transmission was produced in Smith's vehicle) even approached the award approved by the Kentucky Supreme Court. App. 19a n.43 (citing a $13.8 million verdict approved on appeal in Indiana in

1999).

This approach also conflicts with *BMW* itself, which unequivocally requires deference to "*legislative* judgments" made by the State for "comparable" misconduct. 517 U.S. at 583. *BMW* manifestly does not permit out-of-state verdicts returned many years after the alleged misconduct to serve as sufficient "notice" under the third guidepost. Indeed, if such verdicts fulfill the dictates of due process, then escalating awards throughout the nation inevitably—and necessarily—become their own justification over time. At the time of trial in this case, for example, a $15 million punitive award was more than double all other punitive damage awards affirmed in Kentucky *combined*. If that award seems modest today, it is only because punitive award verdicts returned since 1997 have escalated to even more unprecedented heights in product liability cases—of which the $290 million verdict returned by the *Romo* jury in 1999 is not even the most egregious example. *See, e.g., Anderson v. Gen. Motors Corp.*, No. BC116926 (Cal. Super. Ct., L.A. Cnty., Aug. 26, 1999) (reducing punitive damages award from $4.8 billion to $1.09 billion); *Bullock v. Phillip Morris Inc.*, Case No.: BC 249171 (Cal. Super. Ct., L.A. Cnty., Dec. 18, 2002) (reducing punitive damages award to one plaintiff from $28 billion to $28 million).

Escalating jury awards throughout the nation do nothing to define with any specificity the line between lawful conduct and that which the state will punish, or the proper measure of that punishment—particularly when invoked to approve punishment of conduct that occurred years or even decades ago. The eradication of this most fundamental of notice guideposts by the court below warrants certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold the petition pending its resolution of *State Farm*.

January 21, 2002

Respectfully submitted,

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APPENDIX

Appendix A

May 16, 2002

Supreme Court of Kentucky.

SAND HILL ENERGY, INC., Appellant,

v.

FORD MOTOR COMPANY, et al., Appellees.

and

Brenda Smith, Administratrix of the Estate of Tommy Smith, Appellant,

v.

Ford Motor Company, et al., Appellees.

and

Ford Motor Company, et al., Appellants,

v.

Brenda Smith, Administratrix of the Estate of Tommy Smith, et al. Appellees.

Nos. 1999-SC-1028-DG, 1999-SC-1029-DG, 2000-SC-0444-DG.

OPINION OF THE COURT BY CHIEF JUSTICE LAMBERT

Affirming in Part and Reversing in Part

Upon a jury verdict in a products liability action claiming wrongful death, the Estate of Tommy Smith ("the Estate") recovered judgment against Ford Motor Company ("Ford") for three million dollars in compensatory damages and twenty million dollars in punitive damages. The Court of Appeals of Kentucky reversed the judgment on grounds of misallocation of peremptory challenges and ordered a new trial. It did not reach the other issues raised on appeal. We

granted discretionary review to the Estate on the issue decided by the Court of Appeals. We also granted Ford's cross-motion for discretionary review to consider the issues it raised on appeal. Sand Hill Energy is likewise before this Court for review of the trial court's directed verdict, affirmed *sub silentio*, rendered against it.

At the time of his death in 1993 at age thirty, the decedent was working for Sand Hill Energy, Inc., and in the process of unloading bags of ammonium nitrate from a 1977 F-250 Ford pickup truck. The vehicle was parked on a 4% downhill grade, with the motor running and the transmission set in park. While the decedent was behind the vehicle, the transmission "migrated" from park to reverse, and the vehicle moved backwards and up the incline. Smith was slowly crushed to death against a storage shed. He was survived by his widow, Brenda Smith, and their child.

At trial, the Estate presented evidence that the Ford C-6 transmission was defectively designed by virtue of a propensity to migrate from mispositioned false park to powered reverse due to engine vibration. There was evidence that Ford had known of the propensity of the C-6 transmission for such migration for several years prior to the manufacture of the 1977 model F-250 pickup truck involved here. Ford documents bearing 1971 and 1972 dates established that Ford had received numerous customer complaints about its vehicles containing C-6 transmissions that were said to have "jumped out of park into reverse."[1] Other Ford documents reveal its understanding that the shift lever detent design "permits transmission lever placement on a 'land' between a positive park position and reverse position with the possibility of vehicle vibration moving the lever from park to reverse in an

[1] Ford customer complaints regarding a 1972 Ford with C-6 transmission and 10,900 miles, a 1971 Ford with a C6 transmission and 20,074 miles, and a 1969 Mercury with a C6 transmission and 40,400 miles(from a November 28, 1972 Ford memorandum entitled "Automatic Transmissions 'Jumping Out of Park" ' listing the six (6) additional cases reported in the last two (2) weeks).

unattended vehicle."[2] These documents establish the existence of a design flaw and that Ford had knowledge of it long before the vehicle involved here was manufactured.

Ford defended on grounds that the vehicle, sixteen years old and with at least 143,000 miles at the time of the accident, was in deplorable condition. Ford contended that crucial mechanical parts were broken, misaligned, worn or loose, and that other crucial parts had been replaced with makeshift parts. It maintained that the engine and transmission had been entirely rebuilt, that there was internal and external leakage of brake fluid, and concluded that dirt, debris, and corrosion were the likely cause of the accident. Among other things, Ford produced evidence that in post-accident testing by the U.S. Mine Safety and Health Administration, when the vehicle had been placed undeniably in the park latch position, it still migrated to powered reverse on numerous occasions. On the other hand, Ford verified that if a driver shifted the transmission more than 40%, but less than 60%, of the way from reverse to park, i.e., between the reverse valley and the park valley, the transmission would then be in hydraulic neutral and might move into powered reverse due to vibration forces from the engine. It conditioned this admission upon the claim that such a design was common throughout the industry and represented the state of the art at that time.

In 1980, Ford modified the transmission design at issue here to protect against unexpected shifts from park to powered reverse. Ford was also required by virtue of a consent decree with the National Highway Traffic Safety Association ("NHTSA") to send out more than 22 million warnings of the

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[2] Inter Office Communication, D.R. Dixon, Principal Engineer, Ford Classic Safety Systems Department, June 30, 1971. This document also recommends "that forward design and development be directed towards a feasible alternative which positively positions shift lever in park or reverse, to prevent a false sense of security as to transmission position."

possibility of unintended park to powered reverse shifts in its vehicles.

I. PEREMPTORY CHALLENGES

The Court of Appeals reversed the trial court upon its allocation of peremptory challenges and we will first address this issue. To properly analyze this issue it is necessary to examine the structure of the litigation.

Initially, the Smith Estate and two Smith individual parties brought a products liability claim against Ford and Mideast Ford Mercury, Inc. Ford then filed a third party complaint against Sand Hill Energy, Inc., the decedent's employer, because prevailing case law required active assertion of a claim to entitle Ford to an apportionment instruction.[3] In response to the third party complaint, Sand Hill brought a counterclaim against Ford alleging its liability for some $200,000 in regulatory fines and increased workers compensation costs it had incurred as a result of the accident. Thereafter, Ford dismissed its third party claim against Sand Hill. Thus, the basic structure of the litigation was that Smith sued Ford and Ford brought in Sand Hill by means of a third party complaint.[4]

At trial, however, the court restructured the case and designated the Smith Estate and Sand Hill as plaintiffs against Ford as the defendant. Ford then asserted that the Estate and Sand Hill should share peremptory challenges, but the trial court ruled otherwise and allowed the Estate and Sand Hill separate peremptory challenges.

The Court of Appeals adopted Ford's argument that at the time of trial the interests of the Smith Estate and Sand Hill were not antagonistic. The Court quoted but did not entirely

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[3] *Floyd v. Carlisle Construction Co.*, Ky., 758 S.W.2d 430 (1988).

[4] As no issue has been raised as to Ford's good faith in filing and then dismissing its third party complaint, we need not speak to the practice it employed. We note, however, that CR 11 requires that pleadings be in good faith.

observe CR 47.03(1),[5] giving little or no attention to the fact that despite restructuring at trial, the Estate and Sand Hill were opposing sides. Instead the court focused exclusively on whether they had antagonistic interests, the portion of the rule that allows separate peremptory challenges to co-parties with antagonistic interests.

There can be no doubt that the Smith Estate and Sand Hill were not co-parties but were opposing sides. While the Smith Estate did not bring an action against Sand Hill, presumably due to the exclusive remedy provision of the Workers Compensation Act,[6] Ford did bring Sand Hill before the court as a third party defendant. Its purpose may be presumed to have been to obtain an instruction allowing apportionment of all or part of the liability against Sand Hill thereby relieving Ford of any part so apportioned. As such, Ford placed the Smith Estate and Sand Hill on opposing sides, and there was no error in allowing them separate peremptory challenges.

While a strict application of the rule would be sufficient, we make additional observations that bear upon the question of proper allocation of peremptory challenges. The gist of Ford's argument is that by bringing in a third party defendant for purposes of its own and the trial court's determination, for simplicity at trial, that the third party defendant and the plaintiff should be aligned with one another, the plaintiff and the third party defendant should be required to share peremptory challenges. This argument borders on an assertion that the defendant should be able to adopt a strategy for its own benefit that simultaneously diminishes the plaintiff's ability to

[5] CR 47.03(1) states: "In civil cases *each opposing side shall have three peremptory challenges*, but co-parties having antagonistic interests shall have three peremptory challenges each."

[6] The exclusive remedy provision of the Workers Compensation Act, KRS 342.690, precluded the Estate or the decedent's survivors from seeking damages from Sand Hill; *see, e.g., Shamrock Coal Co. v. Maricle*, Ky., 5 S.W.3d 130 (1999); *Zurich American Ins. Co. v. Haile*, Ky., 882 S.W.2d 681 (1994).

pursue its own strategy. At the least, this argument appears at odds with notions of fair play. A party should not be able to create a community of common interests between other parties and then assert that interest to their detriment. But for Ford's decision to bring Sand Hill before the court so that it could reduce its own exposure, there would be no question about the plaintiff's entitlement to separate peremptory challenges as Sand Hill would not be a party to the litigation.

Moreover, under these circumstances, it would be extraordinary to find reversible error. While it may appear in retrospect that the Smith Estate and Sand Hill lacked any substantial antagonistic interest, such could not have been known by the trial court at the time the jury was selected.[7] It has been suggested that the positions parties take at trial should determine whether they have antagonistic interests, but such a rule is utterly unworkable. At the time a trial judge must make the allocation of peremptory challenges, there can be no certainty as to what the evidence will show or precisely what the claims or defenses will be. Moreover, the instant trial court, after having determined that by virtue of their being on different sides, entitling all parties to separate peremptory challenges, nevertheless physically separated the three parties and directed that they have no contact with one another in exercise of their peremptory challenges. We have carefully reviewed *Bowling Green Mun. Utils. v. Atmos Energy Corp.*,[8] and determined that it is factually distinguishably from this case in that the parties to whom were awarded the excessive number of peremptory challenges were all plaintiffs, most of whom were represented by the same counsel. Accordingly, we reverse the Court of Appeals on the per-

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[7] *Mackey v. Greenview Hospital, Inc.*, Ky.App., 587 S.W.2d 249, 259 (1979), makes it clear that the time for determining the allocation of peremptory challenges is when the jury is selected. Despite subsequent dismissal of physician cross-claims, the *Mackey* Court relied on the existence of cross-claims at the time the trial commenced as a factor establishing antagonism of interests.

[8] Ky., 989 S.W.2d 577 (1999).

emptory challenges issue and affirm the actions of the trial court in this respect.

II. ADMISSIBILITY OF EXPERT TESTIMONY

Of the issues presented by Ford on cross-appeal, we will first address the admissibility of the testimony of the Smith Estate's expert, Melvin Richardson. It should be noted at the outset that Richardson is the holder of a B.S. in mechanical engineering from Clemson University, a Master's degree in mechanical engineering from North Carolina State University, and a Master's degree in applied mathematics and a Ph.D. in engineering mechanics from the University of Alabama. From 1965 to 1985, he taught various mechanical engineering courses at Clemson University and since 1981 has investigated and analyzed numerous accidents and incidents in which the Ford C-6 transmission was implicated.

Under prevailing law, a pivotal event in litigation where expert testimony under KRE 702 is proffered is the so-called "Daubert hearing." This Court has embraced *Daubert v. Merrell Dow Pharmaceuticals*[9] and its progeny including *Kumho Tire v. Carmichael.*[10] Our most recent encounter with the law in this area is *Goodyear Tire and Rubber Co v. Thompson.*[11] These cases, while identifying "non-exclusive factors," to be considered by the trial court, all emphasize the gate-keeping function of the trial court and reiterate the considerable breadth of discretion possessed by trial courts.[12] The admissibility standard to be applied has been described as flexible, permitting the trial court to broadly analyze the proffered testimony to discover whether it bears appropriate indicia of reliability.[13] With the admissibility standard described above, a reviewing court must, of necessity, give

[9] 509 U.S. 579 (1993).

[10] 526 U.S. 137 (1999).

[11] Ky., 11 S.W.3d 575 (2000).

[12] *Goodyear* at 578.

[13] *Id.*

great deference to the trial court's ruling and reverse only in circumstances of clear abuse.[14]

The claim by the Smith Estate was that the Ford C-6 transmission produced and installed in the 1977 Ford vehicle was defective by virtue of a "false park" transmission position. Under this contention, a vehicle operator could set the transmission in what appeared to be park, but was actually a "land" between park and reverse, and due to vibration from the engine, the transmission setting could vibrate into powered reverse.

At the Daubert hearing, Dr. Richardson testified to his academic background and teaching experience. He testified to extensive study of the C-6 type transmissions and stated that he had investigated such transmissions as an engineer since 1981. He had tested transmission production units and had done a complete engineering analysis of the shift characteristics of the Ford C-6 transmission. He had compared Ford transmissions with those of other manufacturers.

Ford attacks Dr. Richardson's testimony on grounds that it failed to satisfy the five Daubert factors. It urges a determination of trial court error on grounds of failure to apply these factors to the admission of the Richardson testimony.

The trial court was fully cognizant of its role as gatekeeper. An extensive Daubert hearing was held in which Dr. Richardson testified and was subjected to cross-examination. A key question in the Daubert analysis is whether the theory advanced can be or has been tested. While Dr. Richardson acknowledged not having tested his alternative design, it appears that such would have been unavailing as Ford changed the design in 1980 and adopted changes similar to those proposed by Richardson. The trial court was aware of this as the issue of admissibility of subsequent remedial measures was also before the court on Ford's motion to exclude such

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[14] *Goodyear* at 577-578.

evidence.[15] While not having recited findings of fact, the trial court clearly considered all relevant questions and determined that the proffered testimony satisfied the requirements of Kentucky law as embodied in KRE 702. The trial court was aware of the difference between its role as gatekeeper and the jury's role in determining the weight evidence should have.

Our recent decision in Goodyear v. Thompson emphasizes repeatedly the discretion of the trial court with respect to the admission or exclusion of expert testimony under KRE 702. There was no abuse of that discretion here.

III. SUFFICIENCY OF THE EVIDENCE

Ford claims trial court error for failure to grant its motion for a directed verdict at the close of the evidence. The Court of Appeals did not reach the issue as it had reversed the judgment on other grounds. Ford sought review and the issue of sufficiency of the evidence is properly before this Court.

We have a number of recent decisions articulating the standard by which we review trial court rulings on motions for directed verdict[16]. The prevailing standard is concisely stated in *Lewis v. Bledsoe Surface Mining*,[17] as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence {S.W.2d 462}, these being func-

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[15] *See* KRE 407.

[16] *NCAA v. Hornung*, 754 S.W.2d 855, 860 (1988); *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (1998).

[17] Ky., 798 S.W.2d 459 (1990).

> tions reserved to the trier of fact. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky., 743, 184 S.W.2d 111 (1944), and *Cochran v. Downing*, Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is " 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.' " *NCAA v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed[18].

Ford makes a multi-faceted attack on the evidence offered by the Estate. Primarily, it relies on the age of the vehicle (seventeen years old at the time of the accident) and its significant state of disrepair, and it also claims alteration of the vehicle. Ford also claims a failure of proof of causation. Evidence on behalf of the Estate was presented primarily by its expert witness, Dr. Richardson. Richardson essentially made the case for the Estate, and his testimony, along with the testimony of Ford's experts, answered the contentions Ford makes here. Concerning the condition of the transmission, Richardson testified that despite its age, the relevant parts worked as they did when new by virtue of being sent from the factory in a way a re-builder cannot change. He claimed the underlying defect was unaffected by the age and repair condition of the vehicle. Ford's experts confirmed the propensity of the C-6 transmissions to be mispositioned allowing migration from the false park position to powered reverse. As to possible remedies of the transmission defect, Richardson proposed creating a greater distance between the reverse and park positions and a deeper detent at the park po-

[18] Id. at 461-462.

sition. This alternative design was not inconsistent with the proposal made by Ford engineer D.R. Dixon by memorandum dated December 8, 1971, nor with the design change Ford made in 1980 according to Ford expert Lee Carr. In sum, there was evidence from Dr. Richardson and Ford's engineers that the C-6 transmission was defectively designed to create a false park position creating the propensity upon engine vibration for the transmission to self-shift from false park or to powered reverse.

When all is said and done, the Estate presented substantial evidence of a design defect and some evidence that the cause of the accident was mispositioning of the gear shift on the land position permitting vibration into powered reverse. Ford presented evidence that the vehicle was in a dreadful state of disrepair and some evidence that the gear shift was placed correctly in the park position. With the evidence in such a state, the jury might have found for either side. As this Court said in *Coleman v. Baker.*[19]

> Reasonable probability is all that is required of evidence in order to support a factual conclusion. 20 Am.Jur. 1099, 1101 (Evidence, §§ 1248, 1250). "Evidence reasonably tending to prove the essential facts, either directly or indirectly, or by permissible inference, is sufficient to sustain a judgment.* * * And essential facts may be proved by circumstantial evidence in which event it is not necessary that proof rise to a degree of certainty which will exclude every other reasonable conclusion than the one reached by the jury."[20]

There was no error in the trial court's refusal to grant a directed verdict.

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[19] Ky., 382 S.W.2d 843 (1964).

[20] Id. at 847-848.

IV. AVAILABILITY OF PUNITIVE DAMAGES

As stated at the outset, the jury returned a verdict for punitive damages of twenty million dollars. The Court of Appeals did not reach this issue because it had reversed and remanded on the allocation of peremptory challenges. Ford brought the issue to this Court through its cross-motion for discretionary review.

At the time this case was tried, the controlling legal standard for punitive damages in Kentucky was found in KRS 411.184(1)(c) and required a determination that the defendant acted with "flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm." We have held this statute to be unconstitutional,[21] but in this case, no issue was raised as to the constitutionality of the statute and the case was tried upon the statutory standard. "Since neither of the parties challenged the constitutionality of the statute at trial and since the statute was in effect at the time of the accident and the trial, [this Court] will review the question under the terms of the statute as it then existed."[22]

Ford broadly attacks the legitimacy of the award of any punitive damages in this case. It contends that a determination by the National Highway Traffic Safety Administration which entered into a settlement agreement with Ford and, by the terms of such agreement, required only a mailed reminder instead of a recall, demonstrates that it could not have acted with malice. Ford also claims a finding of malice is precluded by its conformity to industry standards. While there was evidence that Ford C-6 transmissions experienced more park to reverse incidents than those of its competitors, Ford attacks such evidence as being statistically unsound even though some such evidence came from NHTSA documents. As a further explanation, Ford also contends that it received

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[21] *Williams v. Wilson*, Ky., 972 S.W.2d 260 (1998).

[22] *Atmos Energy*, 989 S.W.2d at 580.

more consumer complaints than its competitors because it aggressively investigated and solicited information about park to reverse incidents. As additional basis for claiming that malice was not shown, Ford contends that at most there was a reasonable disagreement among informed persons as to the best product design, and that when reasonable persons can disagree, a finding of malice is precluded. Finally, Ford argues, perhaps disingenuously, that it should not have been subjected to punitive damages "because the only evidence introduced by plaintiff to show 'malice' concerned prior incidents of unattended rearward movement involving Ford vehicles. Presumably, plaintiff hoped to show by implication that Ford must have known of a 'defect' because it had received complaints of unattended rearward movement." Citing David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,*[23] it concludes, "but the bare fact of [even] a large number of product failures...falls far short of establishing the manufacturer's flagrant culpability in selling the product." In this vein, Ford insists that it behaved as a responsible corporation by aggressively undertaking actions to discover the cause of the failure and ameliorate its consequences. Based on this conduct, Ford insists that no reasonable jury could have concluded that it acted with malice.

It is true that during the seven or eight year period between 1972 and 1980, Ford studied the possibility of a new design, responded to a NHTSA investigation, and entered into a settlement agreement with NHTSA whereby Ford agreed to mail reminders to drivers advising them not to leave running vehicles unattended, to secure parking brakes, and to shift fully into park. The Smith Estate, however, presented evidence that in 1970 Ford began receiving complaints concerning incidents of unintended migration from park to powered reverse. Among other things, the Estate produced four exhibits bearing 1971 and 1972 dates from

[23] 49 U. Chi. L.Rev. 1, 23-28 (1982).

Ford engineers articulating problems with the C-6 transmission and disclosing numerous customer complaints of "jumped out of park into reverse" or some similar terminology. Of the exhibits, a memorandum from principal engineer D.R. Dixon is extraordinary in its description of the flaw, recognition of driver misuse, and recommendation of an alternative.[24] From the evidence, a jury could have believed that by November 1972, Ford was well aware of the flaw in its C-6 transmission, but that it continued producing and installing such transmissions until 1980, thus acting with flagrant indifference to the lives of its consumers.

V. PUNITIVE DAMAGE INSTRUCTIONS

We have considered Ford's contention that the trial court erred with respect to the punitive damages instruction it gave. A practice of long- standing in this Court's jurisprudence, indeed a venerated practice, is the giving of "bare-bones" instructions.[25] The instructions given here were taken from

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[24] The text of the Dixon memorandum, with diagram omitted, is as follows:

> Current Chassis shift lever detent design permits transmission lever placement on a "land" between a positive park position and reverse position with the possibility of vehicle vibration moving the lever from part to reverse in an unattended vehicle.
>
> [Diagram] Shift lever-spring loaded against insert plate in improper position which appears to customer as proper.
>
> Present Condition
>
> Present customer usage patterns indicate that this condition of careless shift lever actuation is occurring frequently in the field with actual high accident incidence.
>
> It is recommended that forward design and development be directed toward a feasible alternative which positively positions shift lever in park or reverse, to prevent a false sense of security as to transmission position.

[25] *King v. Ford Motor Company*, 209 F.3d 886 (6th Circuit 2000); *Smith v. Louis Berkman Co.*, 894 F.Supp. 1084 (W.D.Ky.1995); *Young v. J.B. Hunt Transportation*, Ky., 781 S.W.2d 503 (1989); *Cox v. Cooper*, Ky., 510 S.W.2d 530 (1974); *Collins v. Galbraith*, Ky., 494 S.W.2d 527 (1973).

Palmore's *Kentucky Instructions to Juries*[26] and included the language of KRS 411.186. Moreover, counsel for the Estate reminded the jury time and again that the purpose of punitive damages was to punish wrongdoing. We discern no shortcoming in the instructions given that violates the standards set forth in *Hanson v. American Bank*,[27] nor has any other argument been advanced sufficient to persuade us to reexamine our long-standing practices and the authorities upon which they are based.

VI. AMOUNT OF PUNITIVE DAMAGES

We now turn to the issue of whether the amount of punitive damages was excessive, requiring that it be modified or vacated. For years this Court observed the "first blush" rule which focused on whether the amount of punitive damages appeared to have been given under the influence of passion or prejudice and in disregard of the evidence.[28] This rule was modified in *Davis v. Graviss*[29] and *Cooper v. Fultz*[30] where we distanced appellate courts from a direct review of the sum awarded. Instead, we imposed on the trial court the responsibility to analyze whether the award was given improperly, and reserved to appellate tribunals the responsibility to review for abuse of discretion.

> The appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now the appellate court reviews only the actions of the trial judge to determine if his actions constitute an error of law. There is no error of law un-

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[26] John S. Palmore and Ronald W. Eades, *Kentucky Instructions to Juries*, Vol. 2, Civil.

[27] 865 S.W.2d 302 (1993).

[28] See, e.g., *Koch v. Stone*, Ky., 332 S.W.2d 529, 532 (1960).

[29] Ky., 672 S.W.2d 928 (1984).

[30] Ky., 812 S.W.2d 497 (1991).

> til the trial judge is said to have abused his discretion and thereby render his decision clearly erroneous.[31]

In May of 2001, however, the role of appellate courts was changed by the Supreme Court of the United States where federal constitutional questions are preserved and presented for review. No longer may appellate courts defer to trial courts on questions of excessiveness of punitive damages and limit their review to abuse of discretion. We must now return to our former role and review the amount of punitive damages *de novo*.[32] In *Cooper v. Leatherman*,[33] the Supreme Court held that

> the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantial limits on that [state law] discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment applicable to the States. *Furman v. Georgia*, 408 U.S. 238 (1972) *per curium*. The Due Process Clause of its own force prohibits the states from imposing "grossly excessive" punishment on tortfeasors.[34]

On remand to the United States Court of Appeals for the Ninth Circuit, the Court directed that "the *de novo* standard should govern its decision."[35]

In *Leatherman*, the Court re-iterated its reliance on the three factors set forth in *BMW v. Gore* as appropriate for consideration by appellate courts as they undertake the process of *de novo* review.[36] The Gore factors are 1) the degree of reprehensibility of the defendant's misconduct, 2) the dispar-

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[31] *Prater v. Arnett*, Ky.App., 648 S.W.2d 82, 86 (1983).

[32] *Cooper v. Leatherman*, 532 U.S. 424 (2001).

[33] *Id.*

[34] *Id.* at 1684.

[35] *Id.* at 1689.

[36] *Id.* at 1687.

ity between the harm (or potential harm) suffered by the plaintiff and the punitive damages awarded, and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[37]

As to the degree of reprehensibility of Ford's conduct, we conclude that it was substantial. There is no doubt that for at least seven years after Ford knew of the dangerous propensities of the C-6 transmission, it continued producing and installing it in its vehicles. The vehicle which killed Tommy Smith was a 1977 model manufactured five or more years after Ford knew of the dangerous propensity of its transmission. Ford attempts to explain its conduct by relying on the absence of a NHTSA recall, by a reliance on industry standards, and by characterizing its conduct as a "good faith judgment call."[38] The fact remains, however, that by Ford's own engineers and through many consumers, some of whom were maimed or killed, Ford was forcefully informed that its transmission was dangerous.

We must also consider the disparity between the harm suffered by the plaintiff and the punitive damages awarded. The harm to Tommy Smith was death. The harm to his estate was the total destruction of his power to labor and earn money. It would be impossible to overstate the degree of harm. On the other hand, substantial compensatory damages were awarded and the amount of punitive damages was al-

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[37] *BMW v. Gore*, 517 U.S. 559, 574-575 (1996); *Leatherman* at 1687.

[38] We have addressed the industry standards defense in Owens-*Corning v. Golightly*, Ky., 976 S.W.2d 409 (1998), and *Jones v. Hutchinson*, Ky.App, 502 S.W.2d 66 (1973). In *Owens-Corning*, we said:

> The purpose of KRS 411.310(2) is not to insulate an entire industry from liability just because every member of that industry was manufacturing and distributing a product known to be inherently dangerous.

Owens-Corning at 411.

most seven times compensatory damages.[39] We note that in *Leatherman* and *Gore*, the amount of punitive damages awarded was a far greater multiple of compensatory damages than appears here,[40] but we also note that those cases involved relatively small sums in compensatory damages for economic loss, and that to achieve any real punishment, a substantial multiple would be required.

The third *Gore* factor is the difference between the punitive damages awarded and the civil penalties authorized or imposed in similar cases.[41] Ford argues that neither federal nor state penalties for violations of the type at issue here authorize any such award as returned by the jury. It also contends that our prior jury verdicts provided no warning that Ford might be subjected to a $20 million penalty. It points to the $5 million punitive damage judgment upheld in *Hanson v. American Bank*[42] as the largest punitive damage verdict ever affirmed on appeal in Kentucky.

Ford's view of this factor is far too restrictive. This Court is not confined to a review only of Kentucky verdicts and decisions as we consider whether Ford had fair warning that it might be subjected to a significant penalty in a Kentucky court. Ford is a multi-national corporation that is frequently involved in litigation throughout the United States in state

[39] Specifically, the $3 million in compensatory damages included $2 million for loss of earning capacity and $1 million for pain and suffering.

[40] In *Leatherman*, the amount of punitive damages awarded ($4.5 million) was ninety (90) times the amount of compensatory damages ($50,000). In *Gore*, the amount of punitive damages ($4 million) was one thousand (1,000) times the amount of compensatory damages ($4,000). In this case, as mentioned above, the amount of punitive damages was somewhat less than seven times the amount of compensatory damages.

[41] *Gore* at 575, 116 S.Ct. 1589.

[42] Ky., 865 S.W.2d 302 (1993). We recognize that our decision here amounts to a modification of the rule applied in *Hanson v. American National Bank*. In our view, however, the *Hanson* rule has been superceded by the Supreme Court of the *United States in Cooper Industries v. Leatherman*, *supra*.

and federal courts. It possesses a wealth of information as to settlements, verdicts, and trial and appellate court decisions. Ford knew or should have known of the potential for a substantial verdict when its defectively designed vehicle caused the death of a Kentucky consumers. Its national experience and the experience of other automobile manufacturers were sufficient to acquaint it with the reality.[43] While Ford is correct that our decision in *Hanson v. American Bank* is the largest punitive damage award ever finally affirmed by Kentucky courts, it is also true that this Court has in recent years encountered punitive damages in several cases and shown no particular disinclination to uphold such awards where the evidence justified it. In *Owens-Corning v. Golightly,*[44] we affirmed a judgment of $290,000 in compensatory damages and $435,000 in punitive damages.[45] We also held that successive awards of punitive damages for the same course of conduct did not violate the Due Process Clause.[46] In *Kroger v. Wilgruber,*[47] we affirmed a judgment of $500,000 in punitive damages for intentional infliction of emotional distress, and in *Farmland Mutual Insurance Company v. Johnson,*[48] we affirmed a punitive damages judgment of $2 million for bad faith and violation of the Kentucky Unfair Claims Settlement Practices Act.

Our recent decision in *Owens-Corning v. Golightly* contains an excellent analysis of Kentucky law on review of punitive damage awards as it existed prior to *Cooper Industries*

[43] *See, e.g., Ford Motor Co. v. Nowak,* 638 S.W.2d 582 (Tex.App.1982) ($4 million in punitive damages on facts similar to these was affirmed); *Hasson v. Ford Motor Co.,* 32 Cal.3d 388, 650 P.2d 1171 (1982) ($4 million in punitive damages upheld); *Ford Motor Co. v. Ammerman,* 705 N.E.2d 539 (Ct.App.Ind. 1999) (punitive damage judgment of $13.8 million affirmed on appeal).

[44] Ky., 976 S.W.2d 409 (1998).

[45] *Id.* at 410, 413-15.

[46] *Id.* at 412-413.

[47] Ky., 920 S.W.2d 61 (1996).

[48] Ky., 36 S.W.3d 368 (2000).

v. Leatherman. We determined that, contrary to the position of *Owens-Corning*, our process of review was not constitutionally infirm. *Owens-Corning* amounts to a concise statement of the requirements of our law as it existed when this case was tried. We are confident the trial judge discharged his duty to review under the "first blush" rule. In discharge of our new responsibility to review the amount of the punitive damages award de novo, we have considered the factors set forth in *BMW v. Gore* and a number of decisions from other jurisdictions. We recognize the flexibility of the *Gore* factors and that no court has yet discovered an infallible constitutional line or simple mathematical formula for determining whether an award of punitive damages is proper.[49] We observe that many of the cases reversed on appeal for excessive punitive damage awards were cases involving purely economic loss as opposed to loss of life or bodily injury.[50] Our decision in *Golightly* restated a view long held in Kentucky law as to the assessment of punitive damages.

> In Kentucky, the assessment of punitive damages requires consideration of not only the nature of the defendant's act, but also the extent of the harm resulting to the plaintiff. *Fowler v. Mantooth*, Ky., 683 S.W.2d 250, 253 (1984). In other words, the jury is to consider not only the defendant's conduct, but the relationship of that conduct to the injury suffered by this particular plaintiff.[51]

This is not inconsistent with the *Gore* standards.

Upon all of the foregoing, and in discharge of our duty of de novo review under *Cooper Industries v. Leatherman*, and recognizing that substantial compensatory damages were

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[49] *Gore* at 582, 116 S.Ct. 1589.

[50] See, e.g., *Inter Med. Supplies v. EBI Med. Sys.*, 181 F.3d 446, 465-67 (3d Cir.1999); *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 502-05 (8th Cir.1998).

[51] *Golightly* at 412.

awarded, we are of the opinion that $5 million of the punitive damages award should be set aside. We hereby affirm the judgment as to $15 million in punitive damages. As no issue was raised as to the amount of compensatory damages awarded, we will affirm that portion of the trial court's judgment.

VII. SAND HILL DIRECTED VERDICT

At trial, the court granted Ford's motion for directed verdict against Sand Hill Energy, Inc. As earlier stated, Ford brought Sand Hill into the litigation by means of a third party complaint. Sand Hill counterclaimed against Ford for damages sustained in the nature of regulatory fines and increased Workers' Compensation premium costs. Sand Hill reasoned that but for Ford's defective design of the C-6 transmission, the accident would not have occurred and it would not have incurred the enhanced costs. Sand Hill presented evidence that as a result of the accident with Tommy Smith, it had been required to pay an administrative fine of $15,000; that its Workers' Compensation premiums had increased by approximately $35,000. We believe this evidence is sufficient to permit Sand Hill to be heard on its claim and that the trial court erred in directing a verdict against it. While the parties have not raised any issue as to the applicability of principles of collateral estoppel, on remand, the trial court should consider whether it will be necessary to re-try the question of whether the C-6 transmission was defectively designed.

VIII. CONCLUSION

For the reasons set forth hereinabove, the opinion of the Court of Appeals is reversed. The judgment of the trial court of $3 million in compensatory damages and $15 million in punitive damages,[52] plus interest and costs, is reinstated. The judgment of the trial court, affirmed *sub silentio*, granting a directed verdict against Sand Hill Energy, Inc., on

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[52] *See, supra*, p. 496.

its claim is reversed and remanded to the trial court for further consistent proceedings.

LAMBERT, C.J., and KELLER, STUMBO, and WINTERSHEIMER, JJ., concur.

KELLER, J., files a separate concurring opinion.

COOPER, J., files a separate dissenting opinion in which GRAVES and JOHNSTONE, JJ., join.

GRAVES, J., files a separate dissenting opinion in which COOPER and JOHNSTONE, JJ., join.

CONCURRING OPINION BY JUSTICE KELLER

I concur with the majority and vote to reverse the Court of Appeals and reinstate the trial court's judgment. I write separately, however, as to Part I of the majority opinion because I do not agree with the majority's conclusion that the trial court correctly allocated the peremptory challenges authorized by CR 47.03[1] when it permitted the Smith Estate ("the Estate") and Sand Hill Energy, Inc. ("Sand Hill") to exercise a total of eight (8) peremptory challenges by allowing each party separately to exercise four (4) peremptory challenges. As the Estate and Sand Hill were neither opposing parties nor had interests antagonistic to each other, the trial court should have allocated them a total of four (4) peremptory challenges to be exercised jointly. Although I acknowledge that this Court has held that trial court error in the form of allowing excessive peremptory challenges constitutes re-

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[1] CR 47.03(1)-(2):

(1) In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.

(2) If one or two additional jurors are called, the number of peremptory challenges for each side and antagonistic co-party shall be increased by one.

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versible error without a showing of prejudice,[2] I believe that belief is based on a fundamental mischaracterization of the entitlement to peremptory challenges, and I would review the error[3] under CR 61.01. Ford Motor Company ("Ford") has neither alleged, nor demonstrated, how it suffered prejudice from Sand Hill's independent exercise of peremptory challenges, and I believe the trial court's error neither was "inconsistent with substantial justice[4]" nor "affect[ed] the substantial rights of"[5] Ford. Accordingly, I concur in the result reached by the majority.

In large part, this Court has applied a rule of automatic reversal in civil cases when trial courts have erroneously awarded excessive peremptory challenges because the Court has labeled the exercise of such challenges as "substantial

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[2] *Bowling Green Municipal Utilities v. Atmos Energy Corp.*, Ky., 989 S.W.2d 577, 580 (1999) ("Violations of CR 47.03, in order to be subject to appellate reversal, need not show actual prejudice. A simple violation suffices."); *Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, Ky., 590 S.W.2d 875, 877 (1970). *See also Davenport v. Ephraim McDowell Mem. Hosp.*, Ky.App. 769 S.W.2d 56, 59 (1989).

[3] Although I am somewhat amazed and dismayed that I must do so, I emphasize that the trial court's improper allocation of peremptory challenges was simply an *error*--not, as caustically implied by the dissenting opinion, part of a conscious attempt by the Kentucky courts to take from the rich and give to the poor a la Robin Hood and his band of Merry Men.

[4] CR 61.01.

[5] *Id.*

rights."[6] For reasons that I have articulated previously,[7] I find that premise faulty--peremptory challenges are not substantial rights. I will not burden this dissent by restating my position, however, because even if I accept--for the sake of argument, of course--the premise that the entitlement to exercise peremptory challenges constitutes a "substantial right," I would reverse the decision of the Court of Appeals because the trial court's error in this case did not affect Ford's power to exercise peremptory challenges. This Court's prior opinions that have presumed prejudice in cases such as this have simply adopted the reasoning from other, analytically distinct, cases in which a litigant was arguably denied the entitlement to exercise the peremptory challenges authorized by

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[6] *Bowling Green Municipal Utilities v. Atmos Energy Corp.*, supra note 2 at 580 ("[S]ince this Court has elevated the provision of CR 47.03 to the level of being a *substantive right*, we must declare the actions of the trial court to be reversible error[.]" (emphasis added)); *Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, *supra* note 2 at 877 ("As long as they are retained as part of the trial process, however, we believe that their proper allocation between litigants is a *substantial right* which so pervades the process that its erroneous application requires reversal as a matter of law if the issue is properly preserved by the adversely affected litigant." (emphasis added)) *Thomas v. Commonwealth.*, Ky., 864 S.W.2d 252, 259 (1993), cert. denied, 510 U.S. 1177, 114 S.Ct. 1218, 127 L.Ed.2d 564 (1994) ("The rules specifying the number of peremptory challenges are not mere technicalities, they are *substantial rights* and are to be fully enforced." (emphasis added)); *Olympic Realty Co. v. Kamer*, 283 Ky. 432, 141 S.W.2d 293, 297 (1940) ("[T]he right to challenge a given number of jurors without showing cause is one of the most important rights to a litigant; any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise of the right of challenge must be condemned; ...; the terms of the statutes with reference to peremptory challenges are *substantial* rather than technical[.]" (emphasis added)).

[7] *Stopher v. Commonwealth*, Ky., 57 S.W.3d 787, 813-817 (2001) (Keller, J. dissenting). As to Justice Cooper's insinuation of inconsistency, *see Gamble v. Commonwealth*, Ky., 68 S.W.3d 367, 374-5 (2002) (Keller, J., dissenting) ("Although, [in Stopher], I expressed my intention to follow this Court's precedent until a majority of the Court elects to adopt my view, I now realize that I cannot fulfill my oath of office by closing my eyes, reversing a jury verdict that resulted from a fair trial, and remanding the case for *another* fair trial." (footnote omitted)).

court rule.[8] Harmless error review is, in my view, certainly appropriate in cases, such as this one, where the trial court's error in the allocation of peremptory challenges does not prevent a party from exercising the number of peremptory challenges authorized by the rules but rather merely allows a party or parties to exercise an excessive number of such challenges.

We must remember that, "[t]he right of peremptory challenge is not of itself a right to select, but a right to *reject* jurors."[9] In this case, CR 47.03 entitled Ford to remove four

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[8] *See Thomas v. Commonwealth*, *supra* note 6 (holding that a defendant was denied the number of peremptory challenges procedurally allocated to him when forced to use peremptory challenges on jurors who should have been excused for cause); *Olympic Realty Co. v. Kamer*, *supra* note 6 (holding that the right to exercise peremptory challenges was compromised when a juror gave false information during voir dire).

[9] *United States v. Marchant & Colson*, 25 U.S. 480 at 482, 6 L.Ed. 700, 12 Wheat. 480 (1827) (emphasis added). The contrary authority cited by Justice Cooper in his dissenting opinion, *Williams v. Pichard*, 150 Fla. 371, 7 So.2d 468 (1942), appears to adopt a different line of reasoning in conflict with the views of the United States Supreme Court. However, even the Florida courts have subsequently rejected this reasoning. *See Bailey v. Deverick*, 142 So.2d 775 (Fla.App.1962), in which the Court held that changes in Florida's statute governing peremptory challenge deprived *Williams v. Pichard* of precedential effect. The Court then held:

> Seldom, if ever, will excusal of a juror constitute reversible error *for the parties are not entitled to have any particular juror serve*. They are entitled to have only qualified jurors. No complaint is made here that the jurors who served were not qualified.
>
> Under the general rule that error in a matter concerning a jury must be prejudicial to be reversible, the allowance of an excessive number of peremptory challenges is not a ground for a reversal of the judgment based upon the verdict rendered where it appears that the jury was impartial.

(4) jurors by peremptory challenge. It is undisputed that Ford did so, and, as such, Ford was fully afforded the "substantial right" afforded to it by CR 47.03. The trial court's erroneous decision to allow the Estate and Sand Hill to exercise a total of eight (8) peremptory challenges did not affect Ford's entitlement to excuse four (4) jurors. The contention that Sand Hill's exercise of peremptory challenges may have affected the composition of the jury that tried the case[10] erroneously characterizes the nature of the entitlement to peremptory challenge:

> The right, therefore, of challenge, does not necessarily draw after it the right of selection, but merely of exclusion. It enables the [litigant] to say who shall not try him; but not to say who shall be the particular jurors to try him. The law presumes, that every juror sworn in the case is indifferent and above legal exception: for otherwise he may be challenged for cause. What jurors, in particular, shall try the cause, depends on the order in which they are called; and the result is a mere incident following the challenges, and not the absolute

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Id. at 777 (emphasis added and citations omitted). Although the *Bailey v. Deverick* court did not indicate it as a quotation, the first paragraph quoted above comes from *Piccott v. State*, 116 So.2d 626 (Fla.1960), a Florida Supreme Court case rendered after *Williams v. Pichard*. In *Nowling v. Williams*, 316 So.2d 547 (1975), the Florida Supreme Court quoted from *Piccott v. State* and cited *Bailey v. Deverick* with approval. *Id.* at 550.

[10] In this case, however, the trial court's jury selection procedure could have seated the exact same jury even if the trial court had properly required Estate and Sand Hill to exercise a total of four (4) peremptory challenges. The trial court narrowed the jury panel to thirty- two (32) jurors, see KRS 29A.060(2)(a), before allowing the parties to exercise a total of (12) peremptory challenges. The parties used their challenges to exclude twelve (12) distinct jurors, leaving twenty (20) jurors, and the trial court randomly excluded six (6) jurors before seating fourteen (14) jurors to try the case. The element of randomness prevents any generalizations about how changes in the allocation of peremptory challenges would change the composition of the jury actually seated.

> selection of the [litigant] resulting from his power of challenge.[11]

Our civil rules entitled Ford to remove four (4) jurors by peremptory challenge, but gave Ford no right, substantial or otherwise, to have the case tried by any particular twelve (12) jurors. Accordingly, this Court should review the error in this case--one that permitted the Estate and Sand Hill to exercise excessive peremptory challenges, but did not restrict Ford's right to exercise the peremptory challenges authorized by CR 47.03--to determine whether Ford was prejudiced by the improper allocation. CR 61.01 contains no separate rule of "presumed prejudice" for trial court errors involving the allocation of peremptory challenges, and instead states:

> *[N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties* is ground for granting a new trial or setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does no affect the substantial rights of the parties.[12]

While Justice Cooper's dissenting opinion argues that harmless error review is inappropriate for errors in the allocation of peremptory challenges because such errors implicate a party's constitutional rights and because of the difficulty of demonstrating prejudice, neither argument provides a basis for this Court to ignore the plain terms of CR 61.01. First, even if we overlook the complete dearth of authority to support Justice Cooper's novel suggestion that the United States Constitution requires a rule of automatic reversal in cases

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[11] *United States v. Marchant & Colson*, *supra* note 9 (emphasis added).

[12] CR 61.01.

where a trial court improperly allocates peremptory challenges, the fact remains that "even errors of a constitutional magnitude may be held harmless."[13] Secondly, I find it ironic that Justice Cooper's dissenting opinion references the will-o'-the-wisp because it is his allegation of unprovable prejudice that constitutes an illusion that misleads the relevant inquiry. The suggestion that reversal is required whenever a trial court erroneously allocates peremptory challenges simply "elevates form over substance and detracts from the true question of whether the trial court seated a fair and impartial jury."[14]

Here, the trial court's error does not justify reversal because the case was tried before a fair and impartial jury:

> Where a disqualified juror is put on a jury, it is of course error; but, where a qualified juror is improperly rejected, it is a wholly different thing. In such case the man taking his place is qualified and unexceptionable. Is he not as good a juror as the excluded one? Has not the party had what the law designs--a trial by an impartial jury? If you set aside the verdict, upon a new trial he cannot get that rejected man. Is that man better than all the balance of the citizens of the State qualified for jury service? Shall a long, costly trial be upturned for such a cause only to give the party what he has already had--a fair jury? Is the administration of justice to bear the odium of such technicality?[15]

I believe Kentucky should join the ranks of those jurisdictions that require a showing of prejudice before reversing a jury verdict when a trial court erroneously allocates peremptory challenges,[16] because I believe it is a mistake for

[13] *Jackson v. Commonwealth*, Ky.App., 717 S.W.2d 511, 514 (1986) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

[14] *Stopher v. Commonwealth*, *supra* note 7 at 817 (Keller, J., dissenting).

[15] *Thompson v. Douglass*, 35 W.Va. 337, 13 S.E. 1015, 1016 (W.V. 1891).

emptory challenges,[16] because I believe it is a mistake for this Court to presume prejudice from an undisputably harmless technical violation. "[T]he law is concerned ... with the fairness of the trial and the impartiality of the jurors [rather] than with the particular jurors who compose the jury and render the verdict [ ],"[17] and while it has been said that "[t]he purpose of the peremptory challenges is to afford parties a fair trial on the issues to be tried,"[18] it is a party's right to make unlimited challenges for cause, that, both in theory and in practice, secures a fair trial by removing from consideration of the case those jurors that cannot be fair and impartial.

For the reasons stated, I find that the granting of the excessive peremptory challenges in this case constituted harmless error. Accordingly, I concur in the result reached by the majority.

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[16] *See G.R. Jacobi*, Annotation, Effect of Allowing Excessive Number of Peremptory Challenges, 95 A.L.R.2d 975 §§ 3 & 4 (1970).

[17] *Stevens v. Union Railroad Co.*, 26 R.I. 90, 58 A. 492, 498-499 (1904).

[18] *Penker Const. Co. v. Finley*, Ky., 485 S.W.2d 244, 249-250 (1972). Although *Thomas v. Commonwealth*, *supra* note 6 at 259, erroneously cites *Penker Const. Co.* as reversing the trial court "for denying full exercise of peremptory challenges because prejudice is presumed," the Penker Const. Co. Court actually affirmed the jury verdict and held that "the basic issues were such that we find no error in the failure of the trial court to give each defendant three peremptory challenges."

DISSENTING OPINION BY JUSTICE COOPER

In its haste to place its imprimatur on this outrageous verdict by a Clay County "runaway" jury and, presumably, to redistribute the wealth of an out-of- state corporation with requisite deep pockets to stimulate the economy of eastern Kentucky, the majority opinion ignores the facts of this case, our own long-standing precedents, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution as interpreted by the United States Supreme Court.

This accident occurred on September 2, 1993, at a strip mine site owned by Sand Hill Energy, Inc., near Mud Lick in Clay County, Kentucky. This particular site was a new operation that Sand Hill had only opened in August 1993, a few weeks prior to the accident. Tommy Smith was hired by Sand Hill as a general laborer on August 27, 1993, six days prior to the accident. His rate of pay was $7.50 per hour for an average work week of 51.5 hours. The extent of his education was not established. He was thirty years old and had previously worked in a sawmill, in his father-in-law's retail store, in a cabinet shop, and as a general construction laborer. Although a life expectancy of 42.8 years was stipulated, no evidence was introduced to extrapolate Smith's earning potential from his education and work history or to otherwise prove the value of the loss of his power to labor and earn money, which, of course, is the measure of damages for wrongful death. *Luttrell v. Wood*, Ky., 902 S.W.2d 817, 819 (1995); *Dept. of Ed. v. Blevins*, Ky., 707 S.W.2d 782, 783 (1986). Smith's wages and hours at the time of his death, including overtime, would have produced a gross income of $22,327.76 per year. That income maintained over 42.8 years would have produced a total gross income of $955,628.12. Despite any evidence to support a larger award, the instructions to the jury did not limit the maximum award to the amount proven, and the jury's verdict awarded Smith's estate

the sum of two million dollars ($2,000,000.00) for the loss of his power to labor and earn money[1].

Wayne Napier, vice-president of Sand Hill and the foreman/supervisor of the Mud Lick strip mine operation, testified that on the morning of September 2, 1993, he instructed Smith to load twenty-five bags (1,250 pounds) of ammonium nitrate from a free-standing semi-trailer used for the storage of explosives onto a 1977 Ford F-250 pickup truck for transport to another location on the mining site. When he returned some time later, Napier found Smith pinned between the closed doors of the storage trailer and the rear end of the pickup truck. The truck's engine was running, and the vehicle was "quivering." Napier jumped into the cab of the truck, instinctively shifted the transmission to "drive," and moved the vehicle several feet away from the trailer, releasing Smith's body. Smith was unconscious and not breathing. Napier thought he felt a pulse in Smith's arm and unsuccessfully attempted cardiopulmonary resuscitation (CPR). Napier testified that he did not know whether Smith was alive or dead during any of this time. Smith was transported by ambulance to a local hospital where he was pronounced

[1] Despite the fact that a wrongful death action cannot be prosecuted by the decedent's estate and amounts recovered under the wrongful death act are not payable to the estate, KRS 411.130, *Napier's Adm'r v. Napier's Adm'r*, 210 Ky. 163, 275 S.W. 379, 380 (1925), *Rhodes v. Rhodes*, Ky.App., 764 S.W.2d 641, 643 (1988), the wrongful death portion of this action was prosecuted by the "Estate of Tommy Smith," and the entire judgment, including the judgment for wrongful death damages, was awarded to the estate. The parties listed as plaintiffs in the caption of the Complaint were "Estate of Tommy Smith, individually, Brenda Smith, his widow, individually, and Kristen Smith, an infant by and through her next friend, Brenda Smith, jointly, severally and individually." The estate's claim for damages was not only for pain and suffering and for medical and burial expenses (damages properly recoverable by the estate) but also for damages for the destruction of Tommy Smith's power to labor and earn money (damages not recoverable by the estate). Brenda and Kristen Smith, individually, both sought damages only for loss of consortium. The caption did not list Brenda Smith as a party plaintiff in her capacity as personal representative, and the judgment was not awarded to her in that capacity or otherwise.

dead. It was stipulated at trial that Smith's death was caused by injuries sustained in the accident but that "there is a dispute as to the exact time of death after the accident occurred." No medical testimony was presented in this case, and no other evidence was offered to prove that Smith survived the initial impact or, if he did so, that he ever regained consciousness.

"There can be no award for pain and suffering during a state of unconsciousness, as pain must be experienced." 22 Am.Jur.2d Damages § 241 (1988). Thus, "[p]ain and suffering are not proper elements of damages where the decedent was unconscious from the time of the injury until death occurred, for the reason that there was no consciousness of any pain." *Id.* § 249 (citing cases from Arkansas, Connecticut, Hawaii, Louisiana, Maryland, Massachusetts, New York, Pennsylvania, South Dakota and Texas, and a federal case interpreting the law of Wisconsin). The burden of proof was on the estate to introduce evidence not only that the decedent lived for some period of time after the accident, but also that he was conscious and suffered pain after the injury and before death. *Ory v. Libersky*, 40 Md.App. 151, 389 A.2d 922, 928 (1978); see also *Nye v. Commonwealth, Dept. of Transp.*, 331 Pa.Super. 209, 480 A.2d 318, 321 (1984); *Canales v. Bank of Calif.*, 316 S.W.2d 314, 319 (Tex.Ct.Civ.App. 1958). Despite the absence of any such proof, a verdict was rendered, and judgment was entered awarding the Smith estate one million dollars ($1,000,000.00) for pain and suffering. *Contra*, *Worldwide Equipment, Inc. v. Mullins*, Ky. App., 11 S.W.3d 50, 61 (1999) (no damages are recoverable for pain and suffering absent evidence that the decedent survived the initial impact).

Twenty-five bags of ammonium nitrate were found in the bed of the pickup truck, and the 48-inch wide doors to the storage trailer were closed when Smith's body was found. From these facts, the Mine Safety and Health Administration (MSHA) investigators concluded that Smith had finished

loading the bags of ammonium nitrate onto the pickup truck, pulled the vehicle forward at least four feet to create clearance to close the doors of the storage trailer, exited the pickup truck but left the engine running, closed the doors to the trailer, then was killed when the pickup truck suddenly moved backwards and crushed him against the storage trailer. The pickup truck's parking brake was not engaged because it had been rendered inoperable in an earlier accident.

Tests run on the 1977 Ford F-250 pickup truck during the MSHA investigation showed that, if left in "park" with the engine running, the vibration of the engine would sometimes cause its transmission to shift into hydraulic "reverse" which, in turn, caused the truck to move backwards at a quick speed. (There was no evidence at trial to support the majority opinion's factual assertion that "Smith was slowly crushed to death." Op., at 3. That "fact" is found only in the closing argument of the Smith estate's attorney.) Disassembly of the steering column and transmission system revealed that crucial parts, including those vital to the operation of the transmission, were broken, misaligned, worn, or loose, and that others had been replaced with makeshift parts. Both the transmission and the engine had been entirely rebuilt. There was internal and external leakage of brake fluid, and the master cylinder reservoir was virtually empty. Dirt, debris and corrosion were present inside the transmission. The T-bolts, the flange casting, and the insert plate were loose, and the shift linkage was out of adjustment. MSHA fined Sand Hill $15,000.00 for three violations of the Mine Safety and Health Act, 30 U.S.C. § 801, *et seq., viz*:

1. Citation No. 4040480 was issued for the vehicle being left unattended with the park brake not set, in violation of 30 CFR 77.1607(n);

2. Citation No. 4041303 was issued for the automatic transmission gear shift mechanism being worn out and the indicator not synchronizing properly, in violation of 30 CFR 77.404(a);

3. Citation No. 4041301 was issued for the park brake being inoperative on the 1977 Ford, Model F-250 truck, in violation of 30 CFR 77.1605(b).

The jury found that the accident was caused solely by the defective design of the transmission system installed by Ford in the F-250 pickup truck at the time it was manufactured in 1977. In addition to the compensatory damages discussed above, the Smith estate was awarded the further sum of twenty million dollars ($20,000,000.00) (!) in punitive damages. Without reaching the merits of the case, the Court of Appeals reversed for a new trial because of the improper allocation of peremptory strikes. The majority of this Court now reverses the Court of Appeals and affirms the jury's verdict as to liability while paying lip service to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). It also reinstates Sand Hill's claim for damages for increased workers' compensation insurance premiums that it paid after the accident and the $15,000.00 fine imposed by MSHA as a result of the accident. From these erroneous decisions, I am compelled to dissent.

I. FORD'S ENTITLEMENT TO A DIRECTED VERDICT.

The burden of proof was on the Appellants to prove at trial not only (1) the existence of a defective design, but that (2) the defect caused the accident and (3) a reasonable alternative design would have prevented the accident. *Midwestern V.W. Corp. v. Ringley*, Ky., 503 S.W.2d 745, 747 (1973); Restatement (Third) of the Law of Torts § 2(b), cmt. d (A.L.I. 1998). KRS 411.310(1) creates a presumption rebuttable by a preponderance of the evidence (as opposed to the "bursting bubble" approach otherwise established by KRE 301) that a product is not defective if the injury, death or property damage occurred either five years after the date of its sale to a consumer or eight years after the date of its manufacture. The F-250 pickup truck involved in this accident was manufactured by Ford in 1977 and sold new that

same year by Ford's local dealer, Mid-East Ford Mercury, Inc., to Alan "Peewee" Smith. The vehicle was equipped with a C-6 model automatic transmission and a transmission selector mechanism (gear shift) mounted on the steering column. Peewee Smith drove this vehicle 143,000 miles before selling it to his employer, Sand Hill Energy, Inc., in January 1993. Smith testified that, during the more than fifteen years that he owned the vehicle, he never experienced a "park-to-reverse" incident such as demonstrated by the MSHA inspectors after this accident.

In the early 1980s, the shift socket casting on the vehicle's steering column broke, resulting in a total inability to shift the transmission into "park" (as opposed to a "false park" situation where the transmission, having been shifted into "park," would migrate back into "reverse"). Peewee Smith replaced the shift socket casting himself, which required him to disassemble and reassemble the entire steering column. He had never before disassembled a steering column and did not refer to the Ford instructional manual when he did so on this occasion. In 1984 or 1985, Smith had the vehicle's transmission rebuilt by Oscar's Transmission, a local automobile mechanical shop that was not an authorized Ford repair facility. In 1986, Smith purchased a 1979 power steering unit from a local salvage yard and installed it in the pickup truck as a replacement for the original unit. Because the 1979 unit was different from the 1977 unit, it did not fit this truck, so Smith welded a metal bracket onto the unit to hold it in place. Also in the 1980s and after the truck had been driven more than 100,000 miles, Smith removed the entire engine and had it rebuilt by another local automotive mechanical shop that also was not an authorized Ford repair facility. Smith reinstalled the rebuilt engine himself. Later, the shift socket casting he had previously installed broke, and he replaced it himself, again disassembling and reassembling the steering column. Thus, at the time Peewee Smith sold this vehicle to Sand Hill in January 1993, the original shift

socket casting had been replaced twice, the transmission system had been rebuilt, the engine had been rebuilt, and the power steering unit had been replaced with a salvage unit that did not fit this truck.

KRS 411.320 provides that a manufacturer is not liable for damages substantially caused by unauthorized alteration or modification of the product whether or not the manufacturer was at fault or the product was defective. That statute is a reiteration of our common law.

> It has long been the law of this Commonwealth that a manufacturer is not liable when the injuries result from the mutilation or alteration of the chattel. Such intervening conduct severs any causal connection between the product and the injury.

Monsanto Co. v. Reed, Ky., 950 S.W.2d 811, 814 (1997).

Wayne Napier testified that he had driven this particular Ford F-250 on numerous occasions during the eight months the vehicle was owned by Sand Hill and had never experienced a "park-to-reverse" incident, nor had any such incident been reported to him. He admitted on cross-examination that Sand Hill did not use the vehicle on the open road but only to transfer explosives and equipment from one place to another on the strip mine site. On one occasion prior to September 2, 1993, the underside of the vehicle collided with an object with such force that the collision snapped an emergency brake cable, rendering the emergency brake system inoperable. This damage was not repaired; thus, when this accident occurred, there was no emergency brake available to prevent the vehicle from backing into Tommy Smith and crushing him to death.

A. No design defect.

Naturally, the majority opinion focuses on the testimony of the estate's professional witness, Melvin Richardson, who testified that the accident was caused by a design defect in

the C-6 model automatic transmission originally installed in this particular Ford F-250 pickup truck at the time of its manufacture in 1977. Of course, even though the jury instructions required a finding that the defect in the truck's automatic transmission existed "at the time the truck was manufactured by Ford," the automatic transmission that was in the truck at the time of the accident was not the same as had been installed in the truck "at the time the truck was manufactured by Ford" in 1977, but as modified by Peewee Smith, himself, and as rebuilt by Oscar's Transmission in the mid-1980s. Nevertheless, Richardson testified that many C-6 transmissions manufactured by Ford were defective in that, if a driver shifted the transmission more than 40%, but less than 60%, from "reverse" to "park," the transmission would remain in hydraulic "neutral" and could, after some delay, migrate back into hydraulic "reverse" due to engine vibration.

Significantly, Richardson admitted that if this particular truck had been properly maintained and if Smith had shifted the transmission all the way into "park," the accident would not have occurred. Significant, because the tests run on the vehicle by the MSHA inspectors immediately after the accident revealed that *even when the vehicle was shifted all the way into "park."* engine vibration would cause the transmission to migrate into "reverse" and the vehicle to resultantly and suddenly travel backwards at a quick speed. *Ipso facto*, if the accident was caused by the defect observed during the tests conducted immediately after the accident by MSHA, the accident was not caused by the design defect described by Richardson. More plausibly, it was caused either by defects resulting from incompetent repairs performed or defective parts installed while the truck was owned by Peewee Smith, or, possibly, as a result of the accident that disabled the emergency brake after it was sold to Sand Hill.

Wayne Napier testified that, when he shifted the transmission into "drive" so as to release Tommy Smith's pinned

body, he did not notice whether the transmission had been in "park" or "reverse;" thus, contrary to factual assertions in the majority opinion, slip op., at 2, there was no proof at trial either that Tommy Smith set the transmission in "park," or that the accident was caused by the "park-to-reverse" phenomenon described by Richardson. Finally, if this accident was caused by the alleged design defect testified to by Richardson, it would be incredible that the "park-to-reverse" phenomenon would manifest itself for the first time on September 2, 1993, sixteen years and 143,000 miles after the vehicle was manufactured. In summary, Richardson's theory and opinion were not supported by the facts proven in this case. Thus, Appellants did not prove that this accident was caused by a design defect in the manufacture of this vehicle, and Ford's motion for a directed verdict should have been granted.

B. No competent evidence of reasonable alternative design.

Richardson posited that a proper design would have been to increase the distance between the "park" and "reverse" gears, which would require the driver to shift the transmission even farther in order to exceed hydraulic "neutral" and reach "park." (Richardson did not explain how requiring the driver to shift the transmission farther would make it more likely that the driver would complete the shift as opposed to shifting to only 60% of completion. The exact opposite seems more likely.) Richardson admitted that his proposal had never been tested, subjected to peer review, or otherwise proven to be more effective at preventing human error than the design that was used. Nor was there any evidence that his proposed design had been accepted by experts in the field of automotive engineering design. In fact, Richardson had never even reduced his proposal to a sketch, much less a design blueprint. Clearly, Richardson's testimony as to his proposed design was not of sufficient scientific reliability to satisfy KRE 702, as interpreted in *Mitchell v. Common-*

wealth, Ky., 908 S.W.2d 100 (1995), *overruled on other grounds*, *Fugate v. Commonwealth*, Ky., 993 S.W.2d 931 (1999), and *Goodyear Tire and Rubber Co. v. Thompson*, Ky., 11 S.W.3d 575 (2000), adopting *Daubert v. MerrellDow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The absence of any competent evidence of a reasonable alternative design also entitled Ford to a directed verdict.

C. Conformance to then-existing state of the art.

Richardson admitted that in 1977, all four major American automobile manufacturers equipped their vehicles with automatic transmissions having the same design as the transmission installed by Ford in this particular F-250 pickup truck. KRS 411.310(2) creates a presumption rebuttable by a preponderance of the evidence that a product is not defective if it "conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured." While an industry cannot set its own standards by uniformly adopting careless methods, *Owens-Corning Fiberglas Corp. v. Golightly*, Ky., 976 S.W.2d 409, 411 (1998), *Jones v. Hutchinson Mfg., Inc.*, Ky., 502 S.W.2d 66, 70 (1973), the statute "protect[s] a manufacturer from liability for failure to anticipate safety features which were unknown or unavailable at the time the product in question was manufactured and distributed." *Golightly, supra*, at 411. In the early 1980s, the United States Department of Transportation, National Highway Traffic and Safety Administration (NHTSA), conducted an extensive investigation of allegations of "park-to-reverse" incidents involving transmissions installed by all major automobile manufacturers during the period 1966 to 1980 and concluded that no safety recall was warranted. 49 U.S.C. §§ 30118 and 30120 require the issuance of a recall upon a finding of a safety-related defect. Since the C-6 transmission conformed to recognized and prevailing standards in ex-

istence at the time of its manufacture and installation and since the NHTSA's investigation did not establish that the design was sufficiently unsafe to warrant recall, Ford was entitled to the statutory presumption and to a directed verdict on this issue.

II. PEREMPTORY STRIKES.

A. The plurality opinion.

The Court of Appeals correctly concluded, and a majority of this Court agrees, that the trial judge improperly allocated four peremptory strikes each to the Smith estate and Sand Hill Energy, Inc. The Smith estate was precluded from suing Sand Hill by reason of the "exclusive remedy" provision of the Kentucky Workers' Compensation Act. KRS 342.690(1). Ford, however, filed a third-party complaint against Sand Hill for contribution with respect to any amounts it might be required to pay the estate. CR 14.01; *Burrell v. Electric Plant Bd.*, Ky., 676 S.W.2d 231 (1984), *overruled on other grounds, Dix & Assocs. Pipeline Contrs. v. Key*, Ky., 799 S.W.2d 24 (1990). Ford admits that it filed the third-party complaint for the sole purpose of obtaining, at worst, an apportionment of causation against Sand Hill that might reduce its own liability for any judgment rendered in favor of the Smith estate. KRS 411.182; *Baker v. Webb*, Ky.App., 883 S.W.2d 898 (1994). Sand Hill then counterclained against Ford seeking recoupment of the $15,000.00 fine assessed against it by MSHA and the increased workers' compensation premiums it paid after September 1993. Sand Hil's counterclaim did not assert any negligence or causation on the part of Smith and, in fact, alleged that "the total cause of the damages to the plaintiffs, Estate of Tommy Smith, et al., was solely by the negligence in the design or manufacture, or both, of the vehicle by Ford Motor Company ...."

When Ford subsequently dismissed its third-party complaint against Sand Hill,[2] the trial judge entered an order realigning the parties so as to correctly identify Sand Hill as a party plaintiff in recognition of the facts that there were no longer any claims pending against Sand Hill and that it remained a party to the action solely for the purpose of litigating its claims against Ford. The posture of the parties at that point was the same as if Sand Hill had filed an intervening complaint against Ford but not against the Smiths. Civil Rule 47.03(1) and (2) provide:

> (1) In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.
>
> (2) If one or two additional jurors are called, the number of peremptory challenges for each side and antagonistic co-party shall be increased by one.

Until today, we have always held this language to mean that "each party in cases involving multiple parties is entitled to three challenges *only if* the interests of the parties are antagonistic and their defenses inconsistent." *Penker Const. Co. v. Finley*, Ky., 485 S.W.2d 244, 249 (1972) (emphasis added). *See also Bowling Green Mun. Util. v. Atmos Energy Corp.*, Ky., 989 S.W.2d 577, 579 (1999) (error to grant separate peremptory strikes to multiple plaintiffs who sued the same defendants for various categories of damages resulting from a gas explosion and who claimed no negligence on the part of any of the plaintiffs because their interests were not antagonistic); *Kentucky Farm Bur. Mut. Ins. Co. v. Cook*,

[2] It is doubtful that this procedure of filing and then voluntarily dismissing a third-party complaint suffices to require an apportionment instruction against the dismissed third-party defendant. KRS 411.182(1) does not address this issue, and a voluntary dismissal by the third-party plaintiff could be interpreted as a "release" that would discharge the third-party defendant "from all liability for contribution" pursuant to KRS 411.182(4), thus eliminating the basis for apportionment. See *Degener v. Hall Contracting Co.*, Ky., 27 S.W.3d 775, 778-79 (2000).

Ky., 590 S.W.2d 875, 876 (1979) (error to grant additional peremptory strikes to multiple defendants with identical trial positions); *R.E. Gaddie, Inc. v. Evans*, Ky., 394 S.W.2d 118, 120 (1965) ("in the absence of any antagonism shown between the trial positions of [the two plaintiffs] it was error to let them have three challenges apiece"); *District Union Local 227, etc. v. Fleischaker*, Ky., 384 S.W.2d 68, 72 (1964) (multiple defendants asserting a common defense did not have antagonistic interests, thus, were not entitled to separate peremptory strikes); *Davenport v. Ephraim McDowell Mem. Hosp., Inc.*, Ky.App., 769 S.W.2d 56, 59 (1988) (defendants who did not have claims against each other and who shared the same theory of the case were not entitled to separate peremptory strikes because their interests were not antagonistic). The plurality opinion makes a half-hearted and legally unsupportable attempt to distinguish *Bowling Green Municipal Utilities v. Atmos Energy Corp.*, *supra*, and ignores all of the other precedents cited above, then mistakenly relies on *Mackey v. Greenview Hospital, Inc.*, Ky.App., 587 S.W.2d 249 (1979), to justify its departure from the requirements of this Court's own rule, CR 47.03. At the time the jury was selected in *Mackey*, the multiple defendants who were granted separate peremptory strikes had cross-claims against each other and had been separately sued for independent acts of negligence. Neither of those facts were present in *Bowling Green Municipal Utilities* or in the case *sub judice*.

The plurality opinion agrees with the holding in Mackey, supra, that the determination of whether the parties' interests are antagonistic must be made at the time the jury is selected, not before and not afterward. *Id.* at 259. However, the plurality posits that the trial judge in this case could not have known at the time this jury was selected that the Smith estate and Sand Hill did not have antagonistic interests. In fact, we have no way of knowing what the trial judge knew or believed with respect to this issue because, despite extensive pre-trial arguments by the attorneys for all three parties, he

simply awarded the estate and Sand Hill separate peremptory strikes without addressing the issue of whether their interests were antagonistic. What he must have known, however, was that, at the time this jury was selected, the estate and Sand Hill each had a claim against Ford and neither had a claim against the other; each claimed that Ford's negligence was the sole cause of the accident and that neither Smith nor Sand Hill was at fault; each predicated Ford's liability on the same theory, *i.e.* negligent product design; and each intended to rely on the same expert, Melvin Richardson, to prove that theory.

In its pre-trial argument on this issue, Sand Hill's theory of its antagonism against the Smith estate was that Tommy Smith's minor child, Kristen Smith, could potentially reinstate her previously dismissed claim for loss of consortium per *Giuliani v. Guiler*, Ky., 951 S.W.2d 318 (1997), which was rendered only four days before this trial began. Of course, KRS 342.690(1) precludes not only the employee, but also his "legal representative, husband or wife, *dependents, next of kin*, and *anyone otherwise entitled to recover damages*" from suing the employer, *i.e.*, Sand Hill; and, if the child should sue Ford, the positions of the estate, Sand Hill and Ford with respect to apportionment of liability would be the same as in the present case. In fact, absent reversal for a new trial, relitigation of the issue of causation among these parties would be precluded by the principle of issue preclusion. *Sedley v. City of West Buechel*, Ky., 461 S.W.2d 556 (1971). Regardless, the child's potential claim is no more antagonistic to Sand Hill now than it would have been had her claim been tried jointly with that of the Smith estate.

In its pre-trial argument, the Smith estate's expressed theory of its antagonism against Sand Hill was that any time there is an apportionment of fault, there is antagonism among all parties against whom causation is alleged. However, that would be true only if the otherwise unantagonistic parties

were alleging fault against each other. From the day this action was filed until today, both the Smith estate and Sand Hill have continued to assert that there was no contributory fault on the part of Sand Hill for failing to repair the inoperable handbrake, *but see* KRS 189.090(3)(e); and that there was no contributory fault on the part of Smith for permitting the vehicle to stand unattended with the engine running, *but see* KRS 189.430(3). The Smith estate had no motive to place any blame on Sand Hill because it was precluded by KRS 342.690(1) from recovering any damages that might be apportioned against Sand Hill. And Sand Hill had no motive to place any blame on Smith because it had no claim against the Smith estate and any apportionment of causation against Smith would reduce the amount of Sand Hill's recovery against Ford.

Finally, the Smith estate argued (and the plurality opinion buys it, op., at 487) that it would be simply "unfair" to allow Ford to implead an extra party, then require the plaintiff to share its strikes with the impleaded party. Of course, the allocation of peremptory strikes is determined by CR 47.03, not by what a party or the trial judge might perceive as unfair. *Bowling Green Mun. Util. v. Atmos Energy Corp., supra*, at 579. Furthermore, this argument ignores the fact that Ford dismissed its third-party complaint against Sand Hill prior to trial. Sand Hill was a party at trial *only* because of its assertion of an independent claim for damages against Ford. Thus, as the trial judge correctly recognized when he realigned the parties, the posture of this case at trial was the same as if Sand Hill had filed an intervening complaint against Ford. Under that circumstance, there would have been no question about separate peremptory strikes. Nor should there have been any question under the facts as they existed when the jury was impaneled.

The plurality opinion's "coparties" analysis makes no sense. Coparties are parties who are either both plaintiffs or both defendants and who do not have adverse claims against

each other. *Cf. Gish Realty Co. v. Central City*, Ky., 260 S.W.2d 946, 950-51 (1953), *quoting*, annotation, 297 Ky. 309, 179 S.W.2d 441, 152 A.L.R. 1060 (1944). Obviously, the Smith estate and Sand Hill were "coparties" for purposes of CR 47.03(1) at the time this jury was selected.

B. The concurring opinion.

As noted, *supra*, a majority of this Court agrees with the Court of Appeals that the Smith estate and Sand Hill were improperly allocated eight peremptory strikes instead of the four to which they were jointly entitled. Unfortunately, Justice Keller votes to reverse the Court of Appeals because of his notion that the failure to allocate peremptory strikes in accordance with CR 47.03 (or, in a criminal case, RCr 9.40) is essentially "no harm done."[3] His theory is that a party who can prove an erroneous allocation of peremptory strikes is entitled to relief only if that party can also prove that an unfit person actually served on the jury. That fact, of course, is like ignis fatuus, a will-o'-the-wisp incapable of proof.

In his similar dissent in *Stopher v. Commonwealth*, *supra*, note 3, Justice Keller reported that he had carefully reviewed the videotape of the voir dire of the jury and was unable to determine that any juror who sat on that case was unfit to do so. Id. at 813. Of course; for otherwise, the provably unfit juror would have been removed for cause. Provable unfitness, however, is not the premise for peremptory strikes. Peremptory strikes permit parties to excuse from the panel a limited number of "persons thought to be inclined against their interests," though the suspected bias is insufficiently

[3] As he did in *Stopher v. Commonwealth*, Ky., 57 S.W.3d 787, 813-17 (2001), Justice Keller recognizes here that his view is contrary to long-standing Kentucky precedent. Oddly, however, though he dissented in *Stopher* because he perceived that the majority had departed from long-standing precedent with which he disagreed but nevertheless felt compelled to follow until overruled, *id.* at 808, he concurs here with a majority opinion that he acknowledges departs from similar long-standing precedent with which he also disagrees but does not feel compelled to follow until overruled.

provable to warrant removal for cause. *Holland v. Illinois*, 493 U.S. 474, 480, 110 S. Ct. 803, 808, 107 L. Ed. 2d 905 (1990); *see generally, Swain v. Alabama*, 380 U.S. 202, 219-20, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759 (1965), *overruled on other grounds, Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

> [A party] may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted.

Hayes v. Missouri, 120 U.S. 68, 70, 7 S. Ct. 350, 351, 30 L. Ed. 578 (1887). A peremptory strike is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." *Lewis v. United States*, 146 U.S. 370, 376, 13 S. Ct. 136, 138, 36 L. Ed. 1011 (1892) (citing 4 Blackstone's Commentaries 353).

It is this very premise of the peremptory strike, i.e., the right to remove a person suspected of bias that cannot be specifically proven, that belies the theory that a misallocation of peremptories does not warrant reversal absent proof that a biased juror actually sat on the case. And that is why we have consistently held that the "harmless error" rule embodied in CR 61.01 and RCr 9.24, cannot be applied to this type of error.

> The requirement of a showing of actual prejudice effectively nullifies the requirements of the rule on allocation of peremptory challenges. To show actual prejudice, the complaining litigant would be required to discover the unknowable and to reconstruct what might have been and never was, a jury properly constituted after running the gauntlet of challenge performed in accordance with the prescribed rule of the game.

Kentucky Farm Bur. Mut. Ins. Co. v. Cook, supra, at 877 (citing Traynor, The Riddle of Harmless Error 66 (Ohio State Press 1970)). *See also Swain v. Alabama, supra*, 380 U.S. at 219, 85 S.Ct. at 835 (denial or impairment of the right to peremptory strikes is "reversible error without a showing of prejudice"); *Davenport v. Ephrain McDowell Mem. Hosp., supra*, at 59 ("Granting the two non-antagonistic appellees six peremptory strikes was reversible error as a matter of law.").

The genesis of peremptory strikes is in the common law, not the Constitution. *Stilson v. United States*, 250 U.S. 583, 586, 40 S. Ct. 28, 29- 30, 63 L. Ed. 1154 (1919). However, the grant, denial, and exercise of those challenges can have both Due Process and Equal Protection implications, *e.g., Batson v. Kentucky, supra*, 476 U.S. at 89, 106 S. Ct. at 1719, because, whereas an excusal for cause is exercised by an unbiased trial judge for the purpose of excluding a juror deemed legally unfit, a peremptory strike is exercised by a biased litigant for the purpose of honing the composition of the jury to a group deemed most favorable to that litigant's factual point of view.[4] Peremptory challenges are specifically limited and allocated by law, i.e., by statute or rule, so that one side cannot unfairly "stack the deck" by removing all jurors suspected of favoring the other side. *Holland v. Illinois, supra*, 493 U.S. at 481, 110 S. Ct. at 808-09. "[I]f one party is allowed more peremptory challenges than the other, he is in effect, given an advantage in that he may select by indirection particular veniremen to try his cause." *Williams v. Pichard*, 150 Fla. 371, 7 So.2d 468 (1942), rejecting the theory that the right to a peremptory challenge is the right to reject, not the right to select. And in *Pendly v. Illinois Cent. R.R. Co.*, Ky., 92 S.W. 1 (1906), our predecessor Court held that a party was vested with a substantial right to have the other

[4] It is an old saw that a litigant does not want an unbiased jury but a jury that is biased in that litigant's favor.

party's peremptory challenges limited to the number specified by law.

> When the appellant accepted the full jury and tendered it to the defendants, they only had the right to peremptorily challenge three jurors, leaving nine jurors accepted by the appellant in the box. When they were permitted to remove six jurors, a substantial right of the appellant was taken from her. Three jurors that she had accepted, and was entitled to have try her case, were taken off the jury without authority of law.

Id. at 2.

There is no limitation on strikes for cause, and the granting of a motion to strike for cause is generally regarded as discretionary. But the number and allocation of peremptory strikes is established by law, and the trial judge has no discretion whether to apply that law. *State v. Bertrand*, 167 La. 373, 119 So. 261, 262 (1928). *See also Bowling Green Mun. Util. v. Atmos Energy Corp., supra*, at 579 ("the exceptions of CR 47.03 only permit additional strikes when the interests of the parties are antagonistic or when extra jurors are called.... No other exceptions are permitted."). The denial of the peremptory strikes to which a party is entitled denies that party the right afforded by law to excuse prospective jurors perceived to be biased either against that party or in favor of the opposing party. And to grant a party more peremptory strikes than those to which that party is entitled permits that party to excuse more prospective jurors than the law allows for the same reasons. Either way, the beneficiary of the error can "stack the deck" and thereby deny the aggrieved party both Due Process of law and Equal Protection under the law. U.S. Const., amend. XIV § 1; Ky. Const. § 3. For that reason, the misallocation of peremptory strikes is always prejudicial and is always treated as reversible error.

To require a party to prove the unprovable in order to protect a right to which that party is entitled by law would

also render the law, i.e., CR 47.03(1) and RCr 9.40, directory rather than mandatory and enable every trial judge in the Commonwealth to decide for him/herself how many peremptories should be allotted on a case-by-case basis. That is precisely what happened in Bowling Green Municipal Utilities v. Atmos Energy Corp., supra, and we summarily reversed that case for that reason. To permit peremptory strikes to be allocated arbitrarily and inconsistently on a case-by-case, court-by-court basis would be intolerable. It would be better to abolish peremptory strikes than to permit them to become, as here, the tool of judicial arbitrariness. Ky. Const. § 2.

III. PUNITIVE DAMAGES INSTRUCTION.

The Court of Appeals also correctly held that the trial court erred by not instructing the jury on punitive damages in accordance with the requirements of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), and *Hanson v. American National Bank & Trust Co.*, Ky., 865 S.W.2d 302 (1993). In accordance with *Haslip, supra*, 499 U.S. at 19- 20, 111 S. Ct. at 1044, we held in *Hanson* that, to satisfy the Due Process Clause of the United States Constitution, "instructions to the jury must define the purpose of punitive damages as punishment to the wrongdoer and as a deterrent to wrongdoers and others from such activities in the future." *Hanson, supra*, at 310. This is the same definition of punitive damages set forth in KRS 411.184(f).

Here, Ford tendered a punitive damages instruction that complied with the constitutional requirement: "[P]unitive damages are designed to punish Ford for allegedly malicious conduct and to deter Ford and others from engaging in such conduct in the future." Nevertheless, the trial judge gave the jury a punitive damages instruction that did not define the purpose of punitive damages in any respect but simply afforded the jury an unfettered avenue by which to award the Smith estate an unlimited amount of additional compensa-

tion. I conclude from the majority opinion's statement that "We discern no shortcoming in the instructions given that violates the standards set forth in *Hanson v. American Bank* (sic)," op., at 493, that the majority simply has not bothered to read the instructions that were, in fact, given. The instruction on punitive damages obviously did not comply with Due Process requirements, and "[i]n this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial." *McKinney v. Heisel*, Ky., 947 S.W.2d 32, 35 (1997).

IV. EXCESSIVE PUNITIVE DAMAGES.

As stated in *Pacific Mutual Life Insurance Co. v. Haslip, supra*, "unlimited jury discretion ... in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Id.* at 18, 111 S. Ct. at 1043. Because juries sometimes "run wild" in awarding punitive damages, id., it is necessary "to determine whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable." *Id.*; *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562, 116 S.Ct. 1589, 1592, 134 L. Ed. 2d 809 (1996). Noting that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," the 513 United States Supreme Court established in *Gore* a three-pronged test for determining whether a particular award of punitive damages passes constitutional muster: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the amount of the award and the harm or potential harm suffered by the plaintiff; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *Id.* at 574-75, 116 S. Ct. at 1598-99.

1. Degree of reprehensibility.

This issue is resolved by the fact that the NHTSA, the federal agency charged with investigating automobile safety complaints, concluded, after an extensive investigation conducted twelve years before this accident, that vehicles equipped with a transmission of the type installed in this Ford F-250 pickup truck were not sufficiently unsafe to warrant recall. Remember, federal law requires the NHTSA to issue a recall if its investigation reveals a safety- related defect. 49 U.S.C. §§ 30118, 30120.

2. Ratio.

The majority opinion concludes that the five-to-one ratio of punitive damages to compensatory damages approved in this case is an insufficient disparity to warrant a finding of excessiveness. Of course, the majority conveniently overlooks the fact that two-thirds of the compensatory damages awarded in this case were unsupported by any evidence and, thus, also excessive. The ratio should not be determined by measuring the punitive damages award against the unproved compensatory damages awarded by the same "runaway" jury that rendered the punitive damages verdict but against the *actual* damages proven by the evidence. Here, the Smith estate proved $955,628.12 in damages for the destruction of Tommy Smith's power to labor and earn money and introduced no evidence warranting an award of damages for pain and suffering. Thus, the punitive damages verdict was twenty times greater than the actual damages proven, and the award of punitive damages deemed reasonable by a majority of this Court is fifteen times greater than the actual damages proven.

3. Sanctions for comparable misconduct.

This, of course, is the most significant factor proving that the punitive damages awarded in this case are "constitutionally unacceptable." *Haslip, supra*, 499 U.S. at 18, 111 S. Ct. at 1043. At the time of manufacture, at the time of the acci-

dent, and at the time of trial, the maximum permissible civil penalty for a motor vehicle design safety violation permitted by federal law was $800,000.00, even if there was proof of a series of similar violations. 49 U.S.C. § 30165(a).[5] More significantly, under Kentucky law, the maximum criminal penalty that could be imposed against Ford if it had *intentionally* killed Tommy Smith is $20,000.00. KRS 534.050(1)(a). And, of course, the amount of punitive damages approved here is almost three times greater than any previously reported award of punitive damages in Kentucky. The highest previous award was $5,775,000.00 awarded in *Hanson v. American National Bank & Trust Co., supra*, for *intentional* misconduct. The highest previous award of punitive damages in a wrongful death action was $15,000.00 in *Cooper v. Barth*, Ky., 464 S.W.2d 233 (1971), 1/100th of the amount approved today. Clearly, Ford could not, either in 1977 or in 1993, have had "fair notice ... of the severity of the penalty," *i.e.*, $15,000,000.00, that might be imposed upon it for the negligent design of a transmission system manufactured for use in its motor vehicles. For that reason alone, the imposition of these punitive damages deprives Ford of its constitutional rights under the Due Process Clause.

It is now clear that the majority of this Court is incapable of enforcing the constitutional restraints against excessive punitive damages verdicts in this jurisdiction. In *Hanson v. American National Bank & Trust Co., supra*, this Court reversed an order of remittitur of a punitive damages verdict, declaring that there is no authority for court-ordered remittitur in this jurisdiction. *Id.*, 865 S.W.2d at 310. *See also Farmland Mut. Ins. Co. v. Johnson*, Ky., 36 S.W.3d 368, 383 (2000). In *Williams v. Wilson*, Ky., 972 S.W.2d 260 (1998), this Court applied its self-created "jural rights" doctrine to

[5] Congress increased the maximum to $15,000,000.00 by statutory amendment in 2000. Pub.L. 106-414 § 5(a) (2000). Presumably, that is how the majority opinion arrived at the $15,000,000.00 figure approved in this case. Of course an amendment adopted in 2000 could not provide notice with respect to acts that occurred in 1977 or 1993.

declare unconstitutional any legislative enactment that might so much as "impair" the unfettered discretion of juries to award punitive damages. And, today, while purporting to recognize the mandate for *de novo* review established in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra*, the majority does no more thar grudgingly reduce an obviously excessive award to one that is also obviously excessive. Compare *BMW of North America, Inc. v. Gore, supra*, in which the Alabama Supreme Court reduced a $4,000,000.00 punitive damages verdict to $2,000,000.00, which the United States Supreme Court held was still excessive. In approving the slightly reduced, but still excessive, award in this case, the majority opinion repeatedly cites our unanimous opinion in another personal injury product liability case, *Owens-Corning Fiberglas Corp. v. Golightly, supra*. I wrote the opinion in *Golightly*; and suffice to say that the compensatory damages verdict in that case was $290,000.00 and the punitive damages verdict was $435,000.00, a ratio of 1.5 to one, ten times less than the ratio approved here. To compare the damages awarded in *Golightly* with the damages awarded in the case *sub judice* borders on the absurd.

Perhaps, Justice Graves was right when he opined in *Farmland Mutual Insurance Co. v. Johnson, supra*, that "punitive damages have no place in modern tort law." *Id.* at 388 (Graves, J., dissenting). Certainly, punitive damages have no place in the tort law of a jurisdiction whose highest court has abdicated its responsibility to impose reasonable, much less constitutional, restraints against the excessive imposition of such damages. This case, and perhaps the entire concept of punitive damages, begs for further review by a Court that is more interested in Due Process of law than in the redistribution of wealth. Hopefully, this will not be the last Court to evaluate what has occurred in this case.

V. REINSTATEMENT OF SAND HILL'S CLAIM.

The trial judge directed a verdict in favor of Ford with respect to Sand Hill's claim for damages. Indicative of the ma-

jority's mind-set with respect to this entire case is its decision to set aside that dismissal and reinstate Sand Hill's claim for damages. Remember, Sand Hill's claim against Ford was for recoupment of the $15,000.00 in fines imposed against it by MSHA and of the increased workers' compensation insurance premiums that it paid after September 1993.

My research fails to yield even a suggestion in American jurisprudence that the imposition of a fine by a government agency creates a cause of action for damages in favor of the party against whom the fine was levied--no doubt because fines are penalties levied for the actor's own misconduct, not that of another. Presumably, the majority's research was equally fruitless since the majority opinion cites no authority for such a novel legal theory. Further, two of the citations issued by MSHA against Sand Hill pertained to the inoperable emergency brake. The third pertained partly to the fact that the gear shift mechanism on the truck was "worn out" and partly to the fact that the indicator was not properly synchronizing. Only that portion of the fine imposed for the improperly synchronizing indicator could possibly relate to a design defect. Richardson did not testify to that effect and neither he nor any other witness in this case suggested that the accident was caused by an improperly synchronizing indicator. Even if that were not so, Sand Hill offered no evidence to prove how much of the $15,000.00 fine was imposed because of the inoperable emergency brake and worn out gear shift and how much was imposed because of the improperly synchronizing indicator. Thus, the jury could only have speculated as to how much of the $15,000.00 fine, if any, was traceable to an alleged design defect.

Sand Hill's secretary/treasurer, Warren Freeman, testified that the company's workers' compensation insurance premium for "the year ending 1993" was $16,621.00, that the premium for the period September 1993 to September 1994 was $41,130.64, and that the premium for September 1994 to September 1995 was $40,032.64. However, he had no per-

sonal knowledge that the increase was caused by the September 2, 1993 accident as opposed to other factors, e.g., that Sand Hill's new Mud Lick strip mine site did not begin operations until August 1993. KRE 602. Sand Hill had subpoenaed James Arnett of the Mt. Valley Insurance Agency as a witness, perhaps to prove the missing link of causation. When Arnett failed to appear for trial, the trial judge offered to issue a warrant to obtain his presence. After discussing the situation privately with Freeman and Wayne Napier, Sand Hill's attorney announced in open court that he was closing his case without Arnett's testimony and that the judge could "rule whatever you want to with regard to our case." The trial judge quite properly ruled that the case should be dismissed for failure to prove causation.

Accordingly, I dissent from the majority opinion in its entirety.

GRAVES and JOHNSTONE, JJ., join this dissenting opinion.

DISSENTING OPINION BY JUSTICE GRAVES

Respectfully, I must dissent.

Tommy Smith was an employee and agent of Sand Hill, the principal. Any negligent acts of the agent in the course of employment are imputed to the principal. Under the principles of agency law, Tommy Smith and Sand Hill have identical interests.

The Court of Appeals correctly ruled that because Sand Hill and the estate did not have antagonistic interests, the parties were not entitled to additional peremptory challenges. CR 47.03(1) has been consistently interpreted to deny additional peremptories to co-parties when the parties take the same position at trial. *Kentucky Farm Bureau Mut. Ins. Co v. Cook*, Ky., 590 S.W.2d 875, 876 (1979). The mere option for the plaintiff to place blame on Sand Hill does not give rise to the inference that the parties were antagonistic at trial.

Rather, both parties sought to place the blame squarely on the shoulders of Ford Motor Co., leaving no room for doubt about the identical nature of their claims.

At the time of jury selection, CR 47.03(1) requires that there be actual antagonistic interests before additional peremptory challenges may be granted. Kentucky courts have held that interests of co-parties are not antagonistic when the parties take "identical trial positions," *Kentucky Farm Bureau Mutual Ins. Co., supra*, and when the parties "share the same theory of the case." *Davenport v. Ephraim McDowell Mem'l Hosp., Inc.*, Ky.App., 769 S.W.2d 56, 59 (1988). It is clear that in this instance, the estate and Sand Hill satisfy these descriptions perfectly and exclude any antagonistic interests.

Sand Hill was brought into the case only by Ford's third-party complaint, the estate having chosen not to sue it originally. Sand Hill then counterclaimed against Ford as the sole cause of the accident and for expenses incurred. After Ford dropped the complaint against Sand Hill in light of the Workers' Compensation Act, Sand Hill remained in the case only for apportionment purposes. Finally, the Court of Appeals recast Sand Hill as a third-party plaintiff and treated the counterclaim against Ford as a complaint. The estate claims that the label of "Plaintiff" did not change the fact that Sand Hill was realiy a defendant. Regardless of the label placed on Sand Hill, the lack of an adversarial relationship at any point in the proceedings shows that the parties' interests were not antagonistic.

Although Sand Hill was originally brought in as a defendant, which would tend to prove antagonistic interests between it and the estate, it is clear that during the trial both entities were only interested in proving that Ford was at fault. Neither party asserted a claim against the other, and counsel for the estate even assured the jury that Sand Hill was not at fault because they didn't make the truck. Instead, the estate wisely chose to place full blame on Ford, because under Kentucky's Workers' Compensation Act, KRS 342.690(1), Sand

Hill could not be held financially liable. Thus, any fault which the jury attributed to Sand Hill would simply reduce the estate's recovery, and if Sand Hill was found to be 100% at fault, the estate would be denied recovery. Any potential for antagonism quickly vanished when the estate realized the ramifications of the Workers' Compensation Act, and it is inequitable to allow two parties with no intention of suing each other to gain double the usual peremptory strikes and, at least in theory, a more favorable jury. There can be no doubt, given these facts, that the parties shared the same theory of the case and took identical trial positions, making the grant of additional peremptories improper under CR 47.03(1).

The Court of Appeals decision should be affirmed on this issue.

COOPER, J, and JOHNSTONE, J., join in this dissent.

Appendix B

Commonwealth of Kentucky
Court of Appeals

NO. 1997-CA-002420-MR

FORD MOTOR COMPANY — APPELLANT

APPEAL FROM CLAY CIRCUIT COURT
v. HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 94-CI-000167

BRENDA SMITH, AS ADMINISTRATRIX OF THE ESTATE OF TOMMY SMITH; AND SAND HILL ENERGY, INC. — APPELLEES

NO. 1997-CA-002583-MR (CROSS)

ESTATE OF TOMMY SMITH — CROSS-APPELLANT

CROSS-APPEAL FROM CLAY CIRCUIT COURT
v. HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 94-CI-000167

FORD MOTOR COMPANY; MID-EAST FORD-MERCURY, INC.; AND SAND HILL ENERGY, INC. — CROSS-APPELLEES

NO. 1997-CA-002584-MR (CROSS)

SAND HILL ENERGY, INC. CROSS-APPELLANT

CROSS-APPEAL FROM CLAY CIRCUIT COURT
v. HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 94-CI-000167

ESTATE OF TOMMY SMITH;
FORD MOTOR CO.; AND MID-
EAST FORD-MERCURY, INC. CROSS-APPELLEES

OPINION
REVERSING
** ** ** ** **

BEFORE: COMBS, EMBERTON AND McANULTY, JUDGES.

McANULTY, JUDGE: The estate of Tommy Smith (the estate) brought an action in the Clay Circuit Court alleging a transmission design defect in the 1977 Ford F-250 pickup truck that Smith's employer provided him on the job. Tommy Smith (Smith) was fatally injured when he parked the truck on an upgrade with the motor running, exited and walked behind it, and was pinned between the truck and a shed when the truck apparently shifted into reverse gear.

The estate filed suit against Ford Motor Company (Ford) and Mid-East Ford-Mercury, Inc. (Mid-East). In turn, these defendants filed a third-party complaint against Smith's employer, Sand Hill Energy, Inc. (Sand Hill), on the theory that its negligence in purchasing and maintaining the pre-owned truck denying any liability, and counterclaiming against Ford as the sole cause of the accident for expenses which Sand Hill had incurred (such as fines and increased workers' compensation premiums). Subsequently, Ford notified the court that it was abandoning its claims in the third-party complaint due to the workers' Compensation Act, but asked that Sand

Hill remain in the litigation for apportionment purposes.[1] The court, thereafter, realigned the parties so that Sand Hill was a third-party plaintiff, and ordered that its counterclaim against Ford and Mid-East be treated as a complaint. At trial, the jury apportioned 100% of the total fault to Ford and awarded $3 million in compensatory and $20 million in punitive damages to the estate. Ford now appeals this judgment and the punitive damage award.

Ford first claims that the trial court erred in granting four peremptory strikes each to the estate and Sand Hill. Ford argues that since they were aligned as party plaintiffs and did not have antagonistic interests, they were not entitled to additional peremptory strikes. We agree.

The applicable rule is Civil Rule (CR) 47.03(1) which states:

> In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.

In cases interpreting CR 47.03(1), the courts explained that the interests of co-parties were not antagonistic when they "took identical trial positions," *Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, Ky., 590 S.W.2d 875, 876 (1979), and when they "shared the same theory of the case." *Davenport v. Ephraim McDowell Mem'l Hosp., Inc.*, Ky. App., 769 S.W.2d 56, 59 (1988). Thus, we look to the pleadings to determine the trial theories of these parties.

The estate and Sand Hill were aligned in this case as plaintiffs. Each took a position at trial that Ford was wholly

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[1] Ford determined that it was necessary to retain Sand Hill as a nominal party pursuant to KRS 411.182 and this court's opinion in *Baker v. Webb*, Ky. App., 883 S.W.2d 898, 899 (1994), which declared that for apportionment purposes a defendant must bring into litigation a person not named to the suit who may be liable for a portion of the claim against the defendant, or face losing the opportunity for a reduction in judgment based on the negligence of that person.

liable for the accident. The complaint of the estate charged Ford only with liability for defective design and manufacture. The estate did not include Sand Hill as a defendant. Since it could not recover against Sand Hill due to the Workers' Compensation Act, the estate concedes that it sought to hold Ford wholly liable. Sand Hill's counterclaim, treated as a complaint at trial, asserted that the total cause of damages to the plaintiffs was solely the negligence in the design or manufacture, or both, of the vehicle by Ford and Mid-East, and that the defendants were thus responsible for the expenses Sand Hill incurred. Therefore, the trial theory of both parties was that Ford and Mid-East were totally responsible, and neither plaintiff blamed the other as a contributing cause of the accident. As a result, we do not find that these co-parties' interests were antagonistic at the time the jury was selected.

Nevertheless, the estate further asserts that its interests were antagonistic to those of Sand Hill because it could have blamed Sand Hill, or the jury could have found Sand Hill party liable. The estate also notes that the family of Tommy Smith was contemplating filing a loss of consortium claim on behalf of Smith's daughter against Sand Hill. However, we conclude that the estate is citing mere contingencies, when the question of antagonistic interests is determined by the case before the trial court. Although the estate could have presented its theory of the case differently, it did not. The loss of consortium claim against Sand Hill was not a part of this litigation. Thus, these alternate theories of the case are not determinative, and any additional peremptory strikes awarded on that basis were improper.

Because this case will be reversed and remanded, we do not reach the issues of sufficiency of the evidence of liability and the award of punitive damages. We will, however, address a few issues that were contested and are likely to recur in the event of a retrial. Ford argued that the trial court erred in not giving an instruction on the purpose of punitive dam-

ages. In *Hanson v. American Nat. Bank & Trust Co.*, Ky., 865 S.W.2d 302, 310 (1993), the Kentucky Supreme Court noted that instructions to the jury must define the purpose of punitive damages as punishment to the wrongdoer and as deterrent to wrongdoers and others from such activities in the future, citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). Ford's requested instruction was appropriate and should be given if punitive damages are sought on remand. However, we do not find that the trial court erred in denying the other instructions Ford requested in the punitive damage phase of trial.

Additionally, the estate as cross-appellant argued that the trial court erred in conducting a hearing to determine whether evidence offered by its expert would satisfy the admissibility requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). We do not find that it was error for the trial court to conduct a hearing under these circumstances. The remaining issues raised by the estate and by Sand Hill as cross-appellant need not be addressed in this appeal.

For the reasons set fort above, we reverse the judgment of the Clay Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

Appendix C

COMMONWEALTH OF KENTUCKY
41ST JUDICIAL CIRCUIT
CLAY CIRCUIT COURT
CIVIL ACTION NO. 94-CI-00167

ESTATE OF TOMMY SMITH, ET AL., PLAINTIFFS,

VS:

FORD MOTOR COMPANY, ET AL., DEFENDANTS.

JUDGMENT

The above styled action having been called for trial by jury by the Court on June 24, 1997, all parties having announced ready, the following jurors were selected to try the case:

> Lauraretta Ponder; Eugene Carpenter, Jr.; Janice Smith; Diana Sue Henson; Betty Davidson; Lois Gray; Marlene Williams; Anthony Allen; Doyle Eldridge; Kathleen Roberts; Barbara Lawson Henson; Danny Davidson; Hazel Bowling; and JoAnna Wagers.

The case was bifurcated into compensatory and punitive damage portions.

On the liability portion of the case, plaintiff presented their proof, motions were made, the defense presented their proof, motions were made, and the Court instructed the jury. Barbara Lawson Henson had been excused because of illness. There being 13 jurors remaining, the Clerk drew one (1) name from the group to be excused to make the final 12 jurors. Mr. Doyle Eldridge was drawn and excused.

The Court gave the following Instructions:

INSTRUCTION NO. 2

You will find for the Plaintiffs if you believe, from a preponderance of the evidence all of the following, that:

(1) the automatic transmission in the F-250 truck was defectively designed;

(2) such defect existed at the time the truck was manufactured by Ford:

(3) the existence of the defective condition caused such a risk of accidentally injury to persons using the truck or exposed to it while it was in use, that an ordinary prudent manufacturer of similar equipment, being fully aware of such risk, would not have put the truck on the market in that condition;

(4) such defect was a substantial factor in causing the accident and death of Tommy Smith; AND

(5) the automatic transmission in the 1977 F-250 truck was in its original, unaltered and unmodified condition.

The jury answered Instruction No. 2 by Interrogatory No. 1 as follows:

INTERROGATORY NO. 1

(a) Do you find from a preponderance of the evidence, that the plaintiff has established all of the elements set forth in Instruction No. 2?

Yes (X) No _____

If you answered "Yes" to question (a), then answer this question:

(b) Do you find, from a preponderance of the evidence that the defective and unreasonably dangerous condition of the truck was a substantial factor in causing the accident and death of Tommy Smith?

Yes (X) No _____

If Unanimous

If Not Unanimous

JoAnna Wagers
Janice Smith
Anthony Allen
Eugene Carpenter
Dianna Henson
Marlene Williams
Lois Gray
Danny L. Davidson
Betty Davidson

The jury then went to Instruction No. 3, which was as follows:

If you answered "No" to either portion of Interrogatory No. 1, then you have found for the defendant, Ford Motor Company, proceed no further and return to the courtroom.

If you answered "Yes" to both portions of Interrogatory No. 1, then you shall determine from the evidence and enter on Interrogatory No. 4 what percentage of the total fault was attributable to Ford and to each of the other parties. In determining those percentages of fault you shall consider the nature of the conduct of Ford and of each of the other parties, as well as the extent of the casual relation between those parties' respective conduct and the damages claimed.

INSTRUCTION NO. 3

It was Tommy Smith's duty, at the time and place in question, to exercise ordinary care for his own safety. That general duty included the specific duty not to leave his vehicle unattended while the engine was running and the parking brake was not set.

"Ordinary Care", as used in this Instruction, means that degree of care that one would expect an ordinarily prudent person to exercise under similar circumstances.

You shall determine, by answering both portions of Interrogatory No. 2, below, whether Tommy Smith failed to exercise ordinary care for his own safety and whether that failure was a substantial factor in causing the subject accident and injuries.

The jury answers as follows:

INTERROGATORY NO. 2

(a) Did Tommy Smith fail to exercise ordinary care for his own safety at the time and place of the accident in question?

Yes (X) No _____

If Unanimous

If Not Unanimous

JoAnna Wagers
Janice Smith
Anthony Allen
Eugene Carpenter
Dianna Henson
Marlene Williams
Lois Gray
Danny L. Davidson
Kathleen Roberts
Betty Davidson

If you answered "No" to either portion of Interrogatory No. 2, then you shall enter "0%" next to Tommy Smith's name on Interrogatory No. 4, below. If you answered "Yes" to both portions of Interrogatory No. 2, then you shall determine from the evidence and enter on Interrogatory No. 4 what percentage of the total fault was attributable to Tommy Smith and to each of the other parties. In

determining those percentages of fault you shall consider the nature of the conduct of Tommy Smith and of the other parties, as well as the extent of the casual relation between those parties' respective conduct and the damages claimed.

The Court gave Instruction No. 4 to the Jury as follows:

You are instructed that the Court has found Sand Hill Energy, Inc. was negligent.

The jury answered as follows:

INTERROGATORY NO. 3

(a) Was the negligence of Sand Hill Energy, Inc. a substantial factor in causing the accident and the death of Tommy Smith?

Yes _____ No (X)

If you answered "No" to Interrogatory 3, then you shall enter "0%" next to Sand Hill Energy, Inc.'s name on Interrogatory No. 4, below. If you answered "Yes" to Interrogatory No. 3, then you shall determine from the evidence and enter on Interrogatory 4 what percentage of the total fault was attributable to Sand Hill Energy, Inc., to Tommy Smith, and to Ford. In determining those percentages of fault, you shall consider the nature of the conduct of each party as well as the extent of the casual relation between those parties' respective conduct to the damages claimed.

If Unanimous _____ If Not Unanimous

JoAnna Wagers
Janice Smith
Anthony Allen
Eugene Carpenter
Dianna Henson
Marlene Williams

Lois Gray
Danny L. Davidson
Betty Davidson

The jury answered Interrogatory No. 4 as follows:

INTERROGATORY NO. 4

What percentage of the total fault was attributable to each of the following?

Tommy Smith:	*0%*
Sand Hill Energy, Inc.:	*0%*
Ford Motor Company:	*100%*
Total:	*100%*

If Unanimous

If Not Unanimous

JoAnna Wagers
Janice Smith
Anthony Allen
Eugene Carpenter
Dianna Henson
Marlene Williams
Lois Gray
Danny L. Davidson
Betty Davidson

The Court gave Instruction No. 5, and the jury answered as follows:

INSTRUCTION NO. 5

If you answered "Yes" to the interrogatories in Instruction No. 2, without regard to fault, you will award the Estate of Tommy Smith such sum of money as you believe from the evidence will fairly and reasonably compensate Tommy Smith's Estate for the destruction of his power to earn money.

$2 million

If you answered "Yes" to the interrogatories in Instruction No. 2, without regard to fault, you will award the Estate of Tommy Smith such sum of money as you believe would fairly and reasonably compensate Tommy Smith for the physical pain and mental anguish he suffered from the time of his accident until the time of his death.

$1 million

Nine (9) or more who agree or Foreperson, if unanimous:

JoAnna Wagers
Janice Smith
Anthony Allen
Eugene Carpenter
Dianna Henson
Marlene Williams
Lois Gray
Danny L. Davidson
Betty Davidson

At the conclusion of the compensatory stage, proof was taken on punitive damages. Plaintiff presented their roof, Motions were made, the defense presented their proof, Motions were made, and the jury was instructed as follows. The Court gave Instruction No. II:

INSTRUCTION NO. II

You have found for the Estate of Tommy Smith against Ford Motor Company and determined that the Estate was entitled to a sum or sums of money for compensatory damages. If you are further satisfied from the evidence that Ford Motor Company acted toward Tommy Smith with malice, you may in our discretion award punitive damages against Ford Motor Company in addition to the damages you have already awarded. The plaintiff must prove malice with clear and convincing evidence, and you may consider the evidence introduced in the first phase of this trial as well as the second phase of this trial.

As used in this instruction:

(a) "Malice" means either conduct which is specifically intended by Ford Motor Company to cause tangible or intangible injury to the plaintiff or

(b) conduct that is carried out by Ford Motor Company both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

If you award punitive damages in determining the amount thereof, you should consider the following factors.

(a) The likelihood at the relevant time that serious hard would arise from Ford Motor Company's misconduct;

(b) The degree of Ford Motor Company's awareness of that likelihood;

(c) The profitability of the misconduct to Ford Motor Company;

(d) The duration of the misconduct and any concealment of it by Ford Motor Company;

(e) Any actions by Ford Motor Company to remedy the misconduct once it became known to Ford Motor Company.

The jury answered Instruction No. 2 by Interrogatory No. 1 as follows:

INTERROGATORY 1

Do you find that the Estate of Tommy Smith has established malice on the part of Ford Motor Company by clear and convincing evidence?

Yes (X) No _____

If Unanimous If Not Unanimous

_____ *Janice Smith*

Anthony Allen
Eugene Carpenter
Dianna Henson
Lois Gray
Marlene Williams
Danny L. Davidson
Betty Davidson
JoAnna Wagers

The jury answered Interrogatory No. 2 as follows:

If you answered "No" to Interrogatory 1, return to the Courtroom. If you answered "Yes" to Interrogatory 1, please answer Interrogatory 2.

INTERROGATORY 2

How much in punitive damages do you award against Ford Motor Company and for the Estate of Tommy Smith?

Answer: 20 million

JoAnna Wagers
Janice Smith
Anthony Allen
Danny Davidson
Eugene Carpenter
Lois Gray
Marlene Williams
Dianna Henson
Betty Davidson
Kathleen Roberts
Lauraetta Ponder

At the conclusion of the liability portion of the case, the Court inquired of counsel if there were any objections to accepting the jury's verdict, none were made, therefore, this

Court accepts the jury's verdict on the liability portion of the claim.

At the conclusion of the punitive portion of the claim, the Court inquired of counsel if they had any objections to accepting the jury's verdict, none were made, therefore, the Court accepts the jury's findings on the punitive damage stage of the action.

The Court does hereby accept the jury's verdict in the compensatory and punitive stages of this action. The Court does hereby Order and Adjudge that the Plaintiff, the Estate of Tommy Smith, shall recover the defendant, Ford Motor Company, the sum of Three Million ($3,000,000.00) dollars for compensatory damages and the Court further orders that the Estate of Tommy Smith shall further recover from the defendant, Ford Motor Company, the sum of Twenty Million ($20,000,000.00) dollars for punitive damages.

The Judgment shall bear interest at the rate of 12% per annum from the date of the entry of this Judgment. The plaintiff shall be entitled to recover all recoverable court costs.

This is a final and appealable Judgment and there is no just reason for the delay of the entry of same.

Entered this 17th day of July, 1997

R. CLETUS MARICLE
R. CLETUS MARICLE, JUDGE
CLAY CIRCUIT COURT

JAMES S. PHILLIPS 7/17/97
CLERK

Appendix D

COMMONWEALTH OF KENTUCKY
41ST JUDICIAL CIRCUIT
CLAY CIRCUIT COURT
CIVIL ACTION NO. 94-CI-00167

ESTATE OF TOMMY SMITH, ET AL., PLAINTIFFS,

VS.

FORD MOTOR COMPANY, ET AL., DEFENDANTS.

ORDER

The defendant, Ford Motor Company having moved the Court for a Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, and the Court having heard arguments of counsel, and having reviewed the pleading.

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

(1) The motion of Ford Motor Company for a new trial is OVERRULED.

(2) The motion of Ford Motor Company for a Judgment notwithstanding the verdict is OVERRULED.

(3) Ford Motor Company is ordered to pay the fees and expenses of Melvin Richardson relative to its Daulbert hearing.

Entered this 22 day of August, 1997.

R. CLETUS MARICLE
JUDGE, CLAY CIRCUIT COURT

Supreme Court, U.S.
FILED
APR 7 2003
CLERK

No. 02-1096

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

THE ESTATE OF TOMMY SMITH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by this case are:

1. Whether the Kentucky Supreme Court committed constitutional error in upholding the trial court's decision not to instruct the jury on the impermissibility of extraterritorial punishment, in light of the facts that: (a) even after Ford ignored the trial court's repeated warnings not to "open the door" to discussions of nationwide data and extraterritorial conduct, and questioned its own witnesses about such matters, Respondents made only *de minimus* references to Ford's out-of-state conduct, and only after being invited and provoked to do so; (b) the testimony presented and arguments made by Respondents were far removed from *State Farm Mut. Auto Ins. Co. v. Campbell*, (No. 01-1289), where, as part of the plaintiffs' affirmative case, they focused days of testimony, and the bulk of their argument to the jury, on State Farm's out-of-state conduct; (c) Ford thought Respondents' evidence was so diaphanous that it moved for a direct verdict on that ground at the close of Respondents' case on punitive damages, arguing that "they have given the jury no information, data or numbers from which the jury could return any meaningful punitive damages award"; (d) unlike the Utah Supreme Court's decision in *Campbell*, the court below did not base its award of punitive damages against Ford on the basis of Ford's nationwide or exterritorial conduct, and, indeed, never mentioned such; and (e) pursuant to the "invited error"doctrine, *United States v. Wells*, 519 U.S. 482, 488 (1997), Ford is estopped from seeking plenary review of the error it provoked.

2. Whether the Kentucky Supreme Court committed constitutional error in upholding the trial court's decision not to specifically instruct the jury that the purposes of punitive damages are to "punish and deter," in light of the facts that: (a) as this Court explained in *Pacific Mut. Life Ins. Co. v. Haslip*, "[a]s long as the [jury's] discretion is

exercised within reasonable constraints, due process is satisfied," 499 U.S. 1, 20 (1991); (b) the trial court gave the jury detailed statutory-based instructions that were not only anything but "threadbare" but were far more exacting and coherent that the ones upheld in *Haslip*; (c) the trial court's errors, if any, were harmless because Respondents' counsel admonished the jury six times that the purposes of punitive damages are to punish and deter, and Ford's counsel was given equal and ample opportunity to do the same; and (d) the trial court's errors, if any, should be regarded as harmless because Ford is not seeking review of the verdict of a Kentucky jury but the judgment of the Kentucky Supreme Court, which well appreciated the limited legitimate purposes of punitive damages.

3. Whether the Kentucky Supreme Court committed constitutional error in upholding a remitted $15 million punitive damage award—and a mere five-to-one ratio of punitive to compensatory damages—in light of the facts that: (a) that court determined that there was sufficient evidence to support the jury's finding that Ford's misconduct was "intentional" and "malicious" and thus "substantial[ly]" "reprehensib[le]"; (b) the five-to-one ratio of punitive to compensatory damages is well below ratios upheld by this Court before *BMW* and well below ratios routinely upheld by federal and state appellate courts since *BMW*, especially in cases involving human injury and death; (c) Ford's faulty design and its post-design conduct qualified as "aggravating factors" that the *BMW* Court identified as especially meriting punitive damage awards, *i.e.*, (1) Ford's faulty design and its "malicious" conduct had a substantial "effect on [its product's] performance or safety features," *BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 576 (1996); (2) Ford had acted not only with "indifference to or reckless disregard for the health and safety of others," but proven "intentional malice," *id.*; and (3) where the harm was not "purely economic in nature" but involved death, *id.*; (d) Ford had ample notice that it faced a substantial

punitive damages award in this case because: (1) the award was comparable to the punitive damages upheld against Ford fifteen years earlier in a case involving an identically designed defective transmission; (2) the award was comparable to penalties imposed on Ford in other cases involving dangerously defective products; (3) Ford was required to pay nearly as much in what were essentially punitive damages for another defective product that caused deaths in Kentucky just one year before Tommy Smith was killed; and (4) Ford's conduct constituted manslaughter, which exposed it to forfeiture and revocation of its corporate charter and not just civil fines.

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BRIEF FOR RESPONDENTS IN OPPOSITION
STATEMENT OF THE CASE

Tommy Smith, a 30-year-old husband and father, was "slowly crushed to death," 2a, when Petitioner Ford Motor Co.'s defectively designed 1977 Ford F-250 pickup truck spontaneously shifted into reverse. Mr. Smith worked for the Sand Hill Energy Co., a Kentucky mining company. On September 2, 1993, his supervisor told him to use the pickup truck to move bags of ammonium nitrate from a storage trailer to the mine-pit. 2a.; Respondents' Appendix ("RA") 1. After unloading the bags, Mr. Smith pulled the truck four feet away from the trailer, shifted it into park, and, leaving engine running to complete a short-term task, went behind the truck to shut the trailer's doors. 2a; RA-3-4. While he was doing so, the truck's C-6 model transmission, designed, manufactured, and marketed by Ford, suddenly and spontaneously "migrated" from park into powered reverse. The truck moved so quickly that Mr. Smith was unable to jump out of the way. It moved so powerfully—backwards, up a hill—that Mr. Smith was unable wrestle free. 2a; RA-3-4. Some time later, Mr. Smith's supervisor noticed the truck was stationary but "quivering," went to investigate, and discovered him trapped behind the truck. RA-3-4. After the supervisor moved the truck forward, he found Mr. Smith was "gurgling" for air but unable to speak. *Id.* He was rushed to a local hospital, where he died later the same day. *Id.*

Mr. Smith's widow filed a wrongful death suit in the Clay County Circuit Court, 41st Judicial Circuit of Kentucky, on behalf of Mr. Smith's Estate, herself, and their eight-year-old daughter. They claimed that Ford was strictly liable for the C-6 transmission's design defects and negligent for both those defects and for Ford's post-design, post-production, post-sale conduct—primarily for its failure to warn foreseeable users of C-6-equipped vehicles of its design defects and the unreasonable risks those defects caused, as well as for Ford's failure to recall and retrofit

essential improvements to C-6 equipped vehicles to prevent the kind of accident that killed Tommy Smith.

Contrary to Ford's representations, the evidence adduced was neither "'speculati[ve]'" nor insufficient. Pet. 3-5 & 24 (quoting, Pet. 3, n.1, two unpublished cases). Respondents relied upon expert testimony from Mel Richardson, who had earned a Ph.D. in mechanical engineering and had taught Machine Design for twenty years as a full professor of engineering at Clemson University. He had also conducted an extensive study of C-6 transmissions since 1981, 14a, and had served as a Ford consultant and witness.[1] Richardson testified that C-6 transmissions had a literally fatal design flaw, one that lured a driver into mistakenly thinking that a C-6-equipped vehicle was safely in park when it was not, and a tendency for engine vibration to cause the transmission to spontaneously "migrate" from an "illusory" or "false Park" to powered reverse, which, in turn, caused the vehicle to jump backwards, just as it did in this case. 2a. Richardson explained that his proposed alternative design had been validated by Ford itself, which, in 1980, had redesigned the C-6 along the lines he had recommended. 3a, 8a-9a; 10a-11a. Respondents also relied on memos from Ford's engineers to further "establish the existence of a design flaw and that Ford had knowledge of it long before the vehicle involved here was manufactured," 3a, *i.e.*, critical elements for liability for both compensatory and punitive

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[1] *Clay v. Ford Motor Co.*, 215 F.3d 663, 668 (6th Cir.), *cert. denied*, 531 U.S. 1044 (2000). While Ford cites two unpublished cases to undermine Richardson's methodologies as "speculative" and unreliable, it has failed to inform the Court that Richardson's testimony has recently been admitted credited in seven federal and state cases. *See Clay*, 215 F.3d at 669; *Griego v. Ford Motor Co.*, No. 96-00087-CV-4, at 4 (11th Cir. April 13, 2001)(*per curiam*); *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1217 (11th Cir. 1999); *Thornton v. Caterpillar, Inc.*, 951 F.Supp. 575, 576 (D.S.C. 1997); *Greco v. Ford Motor Co.*, 937 F.Supp.810, 816 (S.D.Ind. 1996); *Gentry v. Toyota Motor Corp.*, 471 S.E.2d 485, 487 (Va. 1996); *Gen'l Tire, Inc.*, 917 S.W.2d 444, 449 (Tex.App.).

damages. Richardson further testified that "the underlying defect was unaffected by the age and repair condition of the vehicle." 10a.

The jury found the Respondents' evidence credible and Respondents' arguments more persuasive, specifically finding, *inter alia*, the following facts: (A) the C-6 transmission in the F-250 truck was "defectively designed"; 66a; (B) the C-6 transmission in the F-250 truck was, for all intents and purposes, "in its original, unaltered, and unmodified condition," 66a; (C) "the defective and unreasonably dangerous condition of the truck was [the only] substantial factor in causing the accident and death of Tommy Smith," and Ford was "100%" at "fault." 66a, 70a. Thus the Respondents were awarded $3 million in compensatory damages, "100%" payable by Ford. 70a-71a.

During the punitive damages phase of the bifurcated trial, additional evidence was presented showing that Ford first became substantially aware of numerous accidents caused by C-6 transmissions, and the product's highly dangerous features, as early as 1970, when the company "began receiving complaints concerning incidents." 13a. By 1971, Ford's own "engineers [started] articulating problems with the C-6 transmission and disclosing numerous customer complaints." 14a. RA-14-15. By 1972, Ford's "Principal Engineer" for "Safety Systems" was circulating a memo, RA-18, to management that was "extraordinary in its description of the [C-6] flaw": "'design permits . . . possibility of vehicle vibration moving the lever from park to reverse in an unattended vehicle,'" because even when the "'[s]hift lever-spring [is] loaded against insert plate in improper position [it] appears to customer as proper,'" a phenomenon that "is occurring frequently in the field with actual high accident incidence.'" He then 'recommend[ed] that forward design and development be directed toward a feasible alternative which positively positions shift lever in park or reverse, to prevent a false sense of security as to transmission position.'" 14a & n.24. RA-18. Thus, "[t]here

is no doubt that for at least seven years after Ford knew of the dangerous propensities of the C-6 transmission, it continued producing and installing it in its vehicles," that the vehicle which killed Tommy Smith was a 1977 model manufactured five years after Ford knew of the dangerous propensity of its transmission, and "that by Ford's own engineers and through many consumers, some of whom were maimed or killed, Ford was forcefully informed that its transmission was dangerous." 17a.

The jury found by "clear and convincing" evidence that Ford's conduct was "malic[ious]," which the instructions defined as: "mean[ing] conduct which [was] specifically intended by Ford . . . to cause tangible or intangible injury to the plaintiff" or conduct that was "carried out by Ford . . . both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm." RA-28-29. The jury returned a verdict of $20 million in punitive damages.

Ford had twice challenged the Respondents' evidence before the verdict, unsuccessfully moving the trial court for a directed verdict at the close of Respondents' case in each phase of the trial. After the punitive verdict, Ford moved for a JNOV, and, when that motion was unavailing, Ford appealed to the Kentucky Court of Appeals, and then twice to the Kentucky Supreme Court (first on a petition for discretionary review and a second time on a petition for rehearing). On each occasion, Ford reprised the same evidence and the same arguments, each time contending that the Respondents' evidence was not admissible, was not credible, and was insufficient. Each time the Respondents' evidence was deemed admissible, credible, and sufficient.

The court below undertook a *de novo* review, 20a, and held that the jury instructions on punitive damages had been appropriate and sufficient. 14a-15a. Further, that court found that Ford had been "forcefully informed that its transmission was dangerous" ten years before it changed the design, 17a, and thus that there was ample evidence to

support the jury's finding that Ford's conduct constituted "flagrant indifference." 14a. Finally, after applying *BMW*'s three-part test, that court concluded that although Ford's conduct had been "substantial[ly]" "reprehensib[le]," 17a, and that although comparable penalties imposed in other cases provided Ford with constitutionally sufficient notice that its conduct could expose it to punitive damages similar in size to the one awarded by the jury, on balance that award was too high. Consequently, that court trimmed $5 million from punitive damage award, leaving a $15 million sanction and a five-to-one ratio of punitive to compensatory damages. 20a-21a.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNWARRANTED BECAUSE THIS PUNITIVE DAMAGES AWARD DID NOT PUNISH EXTRATERRITORIAL CONDUCT

Hoping to piggyback on this Court's pending decision in *State Farm Mut. Auto Ins. Co. v. Campbell*, (No. 01-1289), Ford asserts that the judgment here, like the one in *Campbell*, was irredeemably tainted by unconstitutional extraterritorial punishment. Pet. 9. Thus Ford contends that "*Respondents relied at trial extensively on nationwide statistics* relating to Ford's transmissions, and urged punishment on the ground that 'millions and millions of vehicles already on the road . . . are backing up and running over people and causing death and destruction,'" throughout the country. *Id.* at 15-16 (emphasis added)(citing *id.*, at 5).

Whatever this Court's disposition in *Campbell*, that decision ought not govern the decision to grant certiorari in this case, nor should this case be held until *Campbell* is resolved, as Ford requests, Pet. 30, because the record in this case simply does not implicate the issues raised in that one. Assuming, most favorably to Ford, that the evidence presented, arguments made, and judgments entered in *Campbell* are exactly as presented in Petitioner State Farm's merits brief, this case could not be more

distinguishable either from that one or from the other two cases (out of the six cases Ford cites, Pet. 16-18), in which punitive damages were disallowed on extraterritorial grounds.[2] Thus, although there may be some need, some day to revisit the issues raised in *Campbell*—and extensively ventilated in the parties' briefs and the nearly two dozen amicus briefs filed in that case—this case is ill-suited to that venture. There are two reasons why.

A. Even After Ford Ignored the Trial Court's Repeated Warnings Not to "Open the Door," Respondents Made Only *De Minimus* References to Ford's Out-of-State Conduct

1. The *testimony* presented by Respondents in this case was far removed—in both origin and quantity—from *Campbell*. In that case the jury was allegedly presented with "massive amounts of 'expert' and other testimony proffered by plaintiffs regarding various alleged State Farm 'patterns and practices' nationwide." Pet. State Farm's Merits Brief, 2002 WL 1968000, at *6 (referencing more than 100 pages of record transcript). *See id.* at **8-12

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[2] *Compare White v. Ford Motor Co.*, 312 F.3d 998, 1015 (9th Cir. 2002)("[E]vidence focused on the number of vehicles Ford sold . . . and parking brake failures reported nationally. . . . The entire thrust of [plaintiffs'] argument was that . . . jury should vindicate the interests of all Ford truck owners everywhere.") and *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561 n.24 (Ind.App.1999)(punitive damages disallowed because plaintiffs' counsel asked jury to award punitive damages based on sum of cost-savings-per-defective-product times the number sold nationwide), *with Cont. Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634, 637-38(10th Cir. 1996)(because "evidence here focused on OXY's Oklahoma activities," an instruction unnecessary); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1253 (10th Cir. 2000) (instruction unnecessary as "out-of-state incidents offered to illustrate . . . reprehensibility"); *Johansen v. Combustion Eng., Inc.*, 170 F.3d 1320, 1333 (11th Cir.1999)(conduct punished occurred in single state). *OCF Corp. v. Ballard*, 739 So.2d 603, 606 (Fla.App. 1998)(issue of extraterritorial punishment waived by defendant).

(referencing another 320 pages).[3] "These massive amounts of testimony and evidence regarding State Farm's purported . . . practices nationwide overwhelmed the fact that State Farm's conduct toward Mr. Campbell was not shown to be anything other than an isolated, single occurrence in Utah." *Id.* at *11.

Here, by contrast, the only testimony concerning the "millions of vehicles" with defective C-6 transmissions, the "tens of thousands of incidents" where such defective transmissions spontaneously shift from park to powered reverse, and the "hundreds of deaths" that resulted from those defects and those incidents was introduced or invited by Ford. Such testimony came on Ford's direct and Respondents' cross-examination of *Ford's own witnesses*, not Respondents' witnesses. What's more, all the snippets of that testimony took up only *two minutes* of a trial that stretched over three-and-a-half weeks and took up less than *40 lines* out of more than 2,000 pages (and 50,000 lines) of record transcript in this case—a far cry from the days of testimony (and the 420 pages of transcript) on extraterritorial conduct that are at issue in *Campbell*.

Significantly, the only time the jury heard testimony regarding the "millions" of Ford vehicles with C-6 transmissions occurred when Ford's counsel examined a Ford witness.[4] Similarly, the only testimony regarding the

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[3] "[P]laintiffs . . . introduce[d] wide-ranging evidence of State Farm's disparate business practices and conduct nationwide," most "as part of plaintiffs' affirmative case." State Farm's Br., at *7. "Plaintiffs elicited testimony from" a half a dozen of their own witnesses "regarding a wide variety of purported practices nationwide by State Farm," *id.* at *8, including evidence on State Farm's lawful conduct in fifteen States. *Id.* at **8-12 (describing 320 pages of the Joint Appendix). One expert "told the jury that 'this case is . . . about State Farm's pattern and practices nationwide'" and "'more than what happened in Utah .'" *Id.* at *7.

[4] "*Q.* [by Ford's counsel]: 'How many, how many C-6 transmissions were on the road at that time frame?' *A.* [by Ford's witness]: 'Recognizing that the C-6 came out in 1966, it would be several million.'" RA-4.

"thousands" of incidents involving defective C-6s came during Respondents' cross-examination of a Ford witness.[5] Finally, the only testimony regarding the "hundreds" of C-6 related deaths occurred during Respondents' cross-examination of the same Ford witness.[6]

Indeed, Ford considered the Respondents' evidence on punitive damages was so slim that it moved for a directed verdict at the close of Respondents' case on punitive damages, arguing that "they have given the jury no information, data or numbers from which the jury could return any meaningful punitive damages award in this case that has some evidentiary basis," and had provided "no information on number of vehicles, nothing from which the jury can do any such kind of math." RA-6.

2. The *arguments* made by Respondents' counsel in this case likewise were far removed from those made by plaintiffs' counsel in *Campbell*. Although Ford contends that Respondents' counsel impermissibly "urged punishment on the ground that 'millions and millions of vehicles already on the road . . . are backing up and running over people and causing death and destruction,'" Pet. 15-16, when that internal quote is placed in context it shows that

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[5] "*Q.* [by Respondents' counsel]: '[D]id you not sir testify in . . . *Hulsey v. Ford Motor Co.* . . . that there were 23,468 incidents involving Ford vehicles, and you answered yes. . . ?' *A.* [by Ford's witness, Lee Carr]: 'As you read it, but what you said was were there reports that said that was true and were there reports that said it wasn't true, and the answer to that question just as I gave it is yes. You asked me a different question, that is it true that there are 23,000? There are not. That is not true.'" RA-9.

[6] "*Q.* [by Respondents' counsel]: 'Are you---are you aware sir that as of the end of the NHTSA investigation some two hundred deaths had been connected to unintended reverse in Ford vehicles?' *A.* [by Mr. Carr]: 'There were some people who made that claim, but the records show that wasn't true. There were in fact however, a substantial number meaning, probably more than a hundred where people had been killed . . . in events where Ford vehicles moved for a variety of reasons . . . over about a ten year time period.'" RA-7.

"millions and millions of vehicles" were cited to establish Ford's "flagrant indifference to the rights of people on the highway . . . purchasers, consumers," RA-11-12 *i.e.*, one of the statutory elements Respondents needed to establish as a predicate for punitive damages liability, 12a (citing K.R.S. §411.184(1)(c)), and not as a measure of how much punitive damages should be awarded, let alone as a demand for extraterritorial punishment.[7] (Indeed, in *BMW of N.A., Inc. v. Gore*, 517 U.S. 559 (1996), this Court stressed that such evidence is admissible and legitimate as it "is relevant to the determination of the degree of reprehensibility of the defendant's conduct." 517 U.S. at 574, n.21. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462, n.28 (1993)).

By contrast, in *Campbell* plaintiffs' counsel insistently "urged the jury to impose punitive damages on State Farm for its nationwide conduct," telling "the jury that this case 'transcends the *Campbell* file' and 'involves a nationwide practice,'" and "'emphasiz[ing] to the jurors that they were 'going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country . . . .'" State Farm's Br. at *6 (internal citations omitted).

3. Unlike the Utah Supreme Court, which reinstated a $145 million punitive damage award against State Farm almost entirely on the basis of State Farm's "nationwide 'scheme'" and on the basis of evidence that showed the effects of this "scheme" far beyond Utah's borders, *id.* at 17-20, the court below never mentioned nationwide practices

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[7] Respondents' counsel suggested during his closing argument: "If you look at the jury instructions, they talk about flagrant disregard, . . . indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm. . . . [Ford said:] 'Let's call a committee and talk about it and forget about it and hope this thing goes away. We will design out the defect starting in 80' and it will go away. We won't have to worry about those *millions and millions of vehicles already on the road that are backing up and running over people and causing death and destruction.*'" RA-11-12.

or the effect such practices had outside Kentucky and never purported to assume the power or the right to impose punishment for such extraterritorial conduct.

4. The trial court's errors, if any, also should be regarded as harmless because Ford is not seeking review of the verdict of a Kentucky jury but the judgment of the Kentucky Supreme Court. Inasmuch as Ford has conceded that the *de novo* review mandated by *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431-40 (2001), was fairly and competently undertaken by the court below, whatever prejudice Ford may have suffered at the hands of the jury was cured by that court's reexamination of the evidence and its recalibration and reduction of the punitive damages awarded by the jury.

B. Because Ford "Open[ed] . . . the Door" to Evidence of Extraterritorial Conduct, It Is Estopped from Seeking Plenary Review of the Error It Invited and Provoked

Because the evidence and arguments regarding Ford's nationwide practices were first introduced and first made *after* the close of the Respondents' case on punitive damages and only *after* Ford itself had referenced such practices, Ford is estopped from complaining about the consequences of its tactical decision to do so under the "invited error" doctrine, which provides "'that a party may not complain on appeal of errors that he himself invited or provoked . . . .'" *United States v. Wells*, 519 U.S. 482, 488 (1997)(citations omitted). As noted above, Ford sought a directed verdict after the close of Respondents' punitive damages case on the ground that "they have given the jury no information, data or numbers." RA-6. As also noted above, whatever "information" Respondents referenced and whatever arguments Respondents made about C-6 related injuries nationwide came after Ford itself had introduced and discussed such data. Until that time, neither party had done so, even during the liability phase of the case, first, because Ford had "stipulate[d] that [it] was on notice, that

people were alleging that these events occurred," RA-2-3, and second, because Ford had successfully moved the trial court to forbid any discussion of the National Highway and Safety Administration's (NHTSA's) investigation and conclusions, and to forbid discussion of any complaints or data that had prompted NHTSA's investigation and had informed its conclusions. Pretrial Hrg. Order (Dec. 16, 1996), at 2.

When, however, during the punitive damages phase of the trial, Ford decided to reverse course and announced its intention to introduce the NHSTA report and associated data, the trial court repeatedly warned Ford that it was "open[ing] . . . the door" and could not thereafter complain about Respondents' cross-examining Ford's witnesses on these matters or presenting arguments on the basis of such testimony.[8] Although Ford's "plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on Ford and would preclude him from a decision on the merits of his federal [constitutional] claim either in the state courts or here." *Henry v. Mississippi*, 379 U.S. 443, 451 (1965). Because Respondents "responded to the invitation is scarcely grounds for any claim of error here." *DeMarco v. United States*, 415 U.S. 449, 450 (1974)(Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from certiorari).

The invited error doctrine is especially apt in cases like this one. *See Ohler v. United States*, 529 U.S. 753, 755 (2000)(it is "well-established commonsense principle" that "a party introducing evidence cannot complain on appeal that [it] was erroneously admitted").[9] Because Ford chose to

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[8] The trial court warned: "I don't think you can get into the actions, the conclusions of NHTSA without getting into all of it. I think once you open it up, you open it up;" *and* "if we open up the door to NHTSA then everything about NHTSA comes in." RA-5.

[9] *See also United States v. Solis*, 299 F.3d 420, 452 (5th Cir. 2002)("when inadmissible evidence is attributable to the actions of the defense, the defense cannot later object to such invited error.'" (citations

ignore those warnings, it cannot now be heard to protest about the consequences of its own tactical choices.[10]

II. CERTIORARI IS UNWARRANTED AS THE JURY INSTRUCTIONS ON PUNITIVE DAMAGES MET *HASLIP'S* "REASONABLE RESTRAINTS" TEST

1. As this Court explained in *Pacific Mut. Life Ins. Co. v. Haslip*, "[a]s long as the [jury's] discretion is exercised within reasonable constraints, due process is satisfied." 499 U.S. 1, 20 (1991). Although Ford does not quote either the due process test established in *Haslip* or the instructions given to the jury in this case on punitive damages and approved by the court below, RA-28-29, it maintains certiorari is warranted because the instructions in this case were so "threadbare" that they left the jury without "any conceptual understanding of what it is they [were] being asked to award and why," and because the instructions

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omitted)). *Accord, United States v. Van Der Ent*, 52 Fed.Appx. 793, 795, 2002 WL 31780997, *2 (6th Cir. 2002); *United States v. Neal*, 78 F.3d 901, 904 (4th Cir.1996); *United States v. Console*, 13 F.3d 641, 660 (3d Cir. 1993); *Montgomery Elevator Co. v. McCullough* 676 S.W.2d 776, 783-84 (Ky.1984).

[10] On a related point, Ford twice insinuates that the verdict and judgments rendered in this case were tainted by unconstitutional considerations of Ford's wealth and its status as a large, out-of-state corporation, one ostensibly "'without [a] strong local presence.'" Pet. 13 (quoting *Oberg*, 512 U.S. at 432). Thus, Ford quotes the trial judge's comment that "'you can search the United States over and not find anybody that didn't know about Ford,'" Pet. 13 (citation omitted), and the dissenting justices' unsupported speculation that the jury and Kentucky Supreme Court majority sought to "'redistibute the wealth of an out-of-state corporation with requisite deep pockets . . . .'" Pet. 9 (citation omitted). Ford neglects to mention three points. First, the trial judge's above-quoted remarks were made during a bench conference, in which he stressed that he saw no reason for, and would not countenance, such evidence or discussion. Accordingly, Respondents presented no evidence and made no arguments regarding Ford's wealth. Second, far from being "without [a] strong local presence," Ford is the largest automaker and the largest private employer in the state, with 10,900 workers at its two Kentucky plants. http://www.think-kentucky.com/kyedc/pdfs/KYProfile.pdf.

particularly failed to "'enlighten[] the jury'" about the "'nature and purposes'" of punitive damages. Pet. 11 (citation omitted). As might be guessed from the fact that Ford lambastes the instructions at length, but never sees fit to quote them at all, they were drawn verbatim, 15a, from §§411.186 of the Kentucky "Tort Reform Act" of 1988, and that they were very detailed and tightly drawn.

Thus the jury was instructed that: (a) punitive damages were not designed to "compensate" the plaintiff; (b) were not mandatory but entirely "discretion[ary]"; (c) could only be awarded if the Respondents proved "malice" which was defined as: (1) "specific[] intent" to injure "the plaintiff" (but no one else); or (2) "flagrant indifference to the rights of the plaintiff" *and* "subjective awareness that such will result in human death or bodily harm" to the plaintiff (but no one else)); (d) Respondents needed to prove malice with "clear and convincing evidence"; and (e) if punitive damages were warranted at all, the jury needed to consider five additional factors to fix the proper amount. RA-28-29. (The "defendant-friendly" nature of these instructions was further shown by what they did *not* contain and did *not* allow the jury to consider: any harm, actual or potential, to anyone besides the "the plaintiff"; Ford's wealth or net income; and any need to discourage the misconduct of any other wrongdoers, *i.e.*, the much-feared "send-a-message-that-will-be-heard-across-the-state" instruction.)

These instructions scarcely qualify as "threadbare" ones that provide no meaningful guidance to the jury. Pet. 10. Indeed, they provided considerably more guidance to the jury than the rather formless and incoherent instructions this Court upheld in *Haslip*, 499 U.S. 6, n.1. (To facilitate comparison, the complete jury instructions in this case and those in *Haslip* are reprinted, RA-28-29.)

Although Ford maintains that it was deprived of due process because the trial court failed to define the purposes of punitive damages, neither *Haslip*, nor any other decision by this Court, nor any of the "raft of federal- and state-court

decisions," Pet. 12, that Ford cites held that instructions on purposes are indispensable rather than merely desirable, (unlike instructions on matters like "reasonable doubt," which are categorically imperative in every case. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970)). Thus Ford's lead case, *Baker v. Gen. Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), *rev'd on other grounds,* 522 U.S. 222 (1998), did not hold that jury must be instructed on the purposes of punitive damages. In that case, the jury instruction regarding punitive damages stated, *in its entirety:* "You may consider any mitigating or aggravating circumstances attendant upon the death if you find any such circumstances." 86 F.3d 815, n.3. In reversing judgment for the plaintiff the Eighth Circuit merely stated, in *dicta*, that those instructions were "unconstitutionally vague." 86 F.3d at 818. Similarly, Ford's second case, *Farmers Ins. Exch. Shirley,* did not hold that the jury instructions were flawed because they supposedly omitted mentioning the purposes of punitive damages—in fact, the jury was given such an instruction—but rather because the instructions' definition of "malice" was vague and inaccurate. 958 P.2d 1040, 1050-52 (Wy. 1998). The other four cases Ford cites upheld instructions that discussed the purposes of punitive damages, but none held that they would not have done so in the absence of such discussions or that such discussions were essential to due process.

2. Even if the trial court's omission was constitutional error, this Court has often "recognized that 'most constitutional errors can be harmless,'" and that omitted instructions are particularly deserving of harmless error analysis. *Neder v. United States*, 527 U.S. 1, 7, 8-12 (1999)(citation omitted). Under such analysis, Ford has not asserted and cannot establish that that error "had substantial and injurious effect or influence in determining the jury's verdict." *Calderon v. Coleman*, 525 U.S. 141, 145 (1998)(citations omitted). Thus Ford has never explained how its rights were concretely affected in any way. The jury

was instructed, *inter alia*, that punitive damages were not for the purpose of compensation, that they could only be awarded for malicious conduct resulting in untoward profits. RA-28-29. The mere absence of the words "to punish and deter" are not of constitutional dimension.

Significantly, this Court has never insisted that instructions consist of a prescribed formula or "any particular form of words." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). "It is well established that the [constitutionality of an] instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 73 (1991)(citation omitted). In this light—"in the context of the instructions as a whole and the trial record"—there is no reason to believe that the jury's discretion was not cabined within the "reasonable constraints," *Haslip*, 499 U.S. at 20, that Ford's "interest in rational decisionmaking" was not "reasonably accommodated," and that "due process [was not] satisfied." *Id.*

Moreover, if the trial court erred, that error was rendered harmless by Respondents' closing argument, where counsel cautioned the jury six times about the limited purposes of punitive damages. 15a; RA-9-11. Although Ford contends that counsel's argument can never substitute for court instructions, Pet. 12-13, citing *Carter v. Kentucky*, 450 U.S. 288 (1981), and *Taylor v. Kentucky*, 436 U.S. 478 (1978), both cases stand for narrower principles and neither supports Ford's expansive claim. *Carter* held that "the absolute constitutional guarantee against compulsory self-incrimination" requires an instruction that a criminal defendant's decision not to testify may not be used against him, 450 U.S. at 301, while *Taylor* held that a criminal defendant is entitled to an instruction on the

presumption of innocence, which "lies at the foundation of . . . our criminal law." 436 U.S. at 483.[11]

Contrary to Ford's assertion, Pet. 12, neither case rejects Kentucky's use of "bare-bones" jury instructions, which does not substitute counsel's argument for required instructions. Rather, the judge gives the jury a "concise" statement of the applicable law, leaving the details of applying the instructions to the specific facts of the case to be "fleshed out" by counsel. *Young v. J.B. Hunt Transp.*, 781 S.W.2d 503, 506 (Ky. 1989). Here, the trial court offered Ford's counsel the opportunity to argue against awarding punitive damages on any improper basis. Counsel declined the invitation and said nothing at all about the purposes of punitive damages. Whether his "default . . . stem[med] from simple ignorance or the pressures of trial," or whether, as this Court has frequently condemned, a "deliberate[] choice to withhold" an argument "in order to 'sandbag'-- to gamble on" winning outright "while saving a dispositive claim," or an appealable (and hypothetically cert-worthy) issue "in case the gamble does not pay off," *Engle v. Isaac*, 456 U.S. 107, 129 & n.34 (1982), Ford is not permitted to profit from either its counsel's mistakes or his tactics. *See Granberry v. Greer*, 481 U.S. 129, 131-32 (1987); *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977).

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[11] This Court limited *Taylor's* "hold[ing]" to "the facts of this case." 436 U.S. at 490. Although Ford quotes *Taylor* for the proposition that "'arguments of counsel cannot substitute for instructions by the court.'" Pet. 13, quoting *id.* at 488-89, it neglects to quote the succeeding sentence, which provides both the rationale for—and the limits to—this rule: "[defendant's] right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that *defense counsel* will be a more effective advocate for that proposition than the *prosecutor* will be in implying that extraneous circumstances may be considered." *Id.* at 489 (emphasis added). But that was not the case here, where both counsel had a chance for "advoca[cy]" about the legitimate purposes of punitive damages and the party "prosecut[ing]" the case repeatedly did so. *Carter's* holding "is similarly limited to its inapposite facts.

Moreover, as discussed in Section I.A.4., the trial court's errors, if any, also should be regarded as harmless because Ford is not seeking review of the verdict of a Kentucky jury but the judgment of the Kentucky Supreme Court.

3. Although some juries may be biased against large corporations "'without strong local presences,'" Pet. 13 (quoting *Oberg*, 512 U.S. at 432), it is highly unlikely that this jury was prejudiced against Ford. As explained above, no company, foreign or domestic, has a "strong[er] local presence[]" in Kentucky than Ford, where it is the largest company and employer in the state. *See* n.10, *supra*. Ford's claim that Respondent's counsel brazenly told the jury that their discretion was unlimited but nothing more, is also belied by the facts, as the "figure that [he] suggest[ed] to" the jury, was $45 million, not $500 million. RA-12-13.

4. Finally, if the gist of Ford's argument is that a definitional instruction on punitive damages is required by the Constitution, certiorari is not warranted because Kentucky has now adopted a new standard jury instruction manual, one that requires juries to be told that "'[p]unitive damages' are . . . for the sole purpose of punishing . . . and discouraging . . . ." 2 J. Palmore, KY. INSTR. TO JURIES (CIVIL) §39.15 at 44 (2003 Supp.). In light of this fact and in light of the fact that Ford has not identified another case in which another court has duplicated the putative error below, this case does not present an issue of sufficient national importance to warrant certiorari.

III. CERTIORARI IS UNWARRANTED BECAUSE THE KENTUCKY SUPREME COURT PROPERLY CONCLUDED THAT THE PUNITIVE DAMAGE AWARD WAS NOT "GROSSLY EXCESSIVE"

A. The Court Below Properly Concluded that Ford's "Intentional" "Malice" in Marketing a Product It Knew Was Dangerously Defective Was "Substantial[ly]" "Reprehensib[le]"

As this Court explained in *BMW*, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 575. Essentially asking this Court to sit as a court of errors, Ford contends that its conduct was not sufficiently reprehensible to warrant "any punishment," let alone the "excessive" jury award that substantially reduced by the court below. Pet. 24. According to Ford this is so because "*the underlying evidence* was simply that Ford's engineers were aware the C-6 transmission—[allegedly] like all automatic transmissions—could permit park-to-reverse migration in cases of incomplete shifts" and knew that "alternative designs could lead to even more mishaps," Pet. 22-23 (emphasis added), and that it allegedly had made a reasonable, "good-faith attempt to minimize competing safety risks," Pet. 23, as proven by the facts that: (a) the C-6 allegedly satisfied the supposedly relevant industry "recommendation"; (b) C-6 transmissions were no worse than those designed and manufactured by other automakers, as demonstrated by the fact that they were not involved in park-reverse accidents more often than those in other manufacturers' vehicles; (c) the C-6 design supposedly satisfied relevant federal motor vehicle safety standards (none of which were ever named or cited); (d) federal regulators, specifically NHTSA, had given the C-6 a clean bill of health, (e) and the "vast majority of other civil juries" had done the same. *Id.* (The evidence regarding Ford's "vast majority"—which showed that plaintiffs won "only" 26% of C-6 related cases—came in a two-page and conclusory affidavit from a Ford lawyer filed in support of Ford's motion for a JNOV. (filed July 28, 1997). RA-22-23.

Aside from the last, irrelevant, and misleading assertion that Ford had been exonerated by the "vast majority of

other civil juries,"[12] the "underlying evidence" regarding each of these points was fully presented Ford's to the jury in this case, which, looking at Ford's proof with a less self-interested eye, saw things quite differently and thus found that Ford was "100%" at fault for Tommy Smith's death. 70a. The jury found that far from making reasonable, good-faith efforts to minimize competing safety risks, Ford had acted "maliciously and/or with "flagrant indifference" in designing, manufacturing, and marketing the C-6 equipped the vehicle that killed him. Significantly, as noted above, Ford pressed the same evidence and fact-laden arguments to Kentucky courts six separate times in this case and never found a taker. Ford has advanced no reason why it is now entitled to what amounts to an eighth bite at the apple (counting the jury's) and why this Court should grant certiorari to review these quintessential jury issues[13] one more time. The fact that Ford did not obtain the result it

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[12] The fact that most "other . . . juries" supposedly saw it Ford's way is irrelevant because the different evidence presented in those cases cannot collaterally estop the proof established in this one. That datum also is misleading because Ford may have reasonably chosen to litigate the cases it thought it could win and to settle the cases it was sure to lose. Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 Emory L.J. 523, 558 (1996). In fact, Ford was required to pay out more than $5.9 million in compensatory and punitive damages in just three C-6 related cases that were tried to a verdict (including $4 million in punitive damages), and more than $5.5 million in just *22* public settlements during the 1970s and 1980s. RA-26-27. "Many settlements are, of course, confidential and therefore never reported." Michael I. Krauss, *Product Liability And Game Theory*, 2002 B.Y.U. L. Rev. 759, 827, n.10 (2002).

[13] Courts agree that compliance with industry or government standards is a jury question. *See, e.g., James G. Brown Fnd., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1991); *Kuwait Airways Corp. v. Am. Sec. Bank, N.A.*, 890 F.2d 456, 464 (D.C. Cir. 1989); *Safeco Ins. Co. v. City of White House*, 191 F.3d 675, 687 (6th Cir. 1999); *Boerner v. Brown & Williamson Tob. Corp.*, 260 F.3d 837, 846 (8th Cir. 2001); *Alfred v. Caterpillar, Inc.*, 262 F.2d 1083, 1089 (10th Cir. 2001).

sought from the jury and six times from the courts below does not make this case cert-worthy.

This is particularly so because what the "underlying evidence" truly showed was that there were no written industry or government design, manufacturing, or performance standards on the key questions of how an automatic transmission should be built (aside from an irrelevant "recommend[ation]" for a "standard pattern or sequence"—the familiar "P-R-N-D-L"—"for the manual control of automatic transmissions," RA-20-21, that C-6 transmissions spontaneously shifted into reverse far more often than those made by Ford's competitors, 12a, that NHTSA's inaction was more an expression of exhaustion than exoneration, *see Center for Auto Safety v. Lewis*, 685 F.2d 656, 600 (D.C. Cir. 1982), and, in any event neither regulatory inaction nor compliance with government regulations preempts state common law tort remedies or bars awards of punitive damages where, as here, a tortfeasor's conduct transgresses the state law standards for such awards.[14]

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[14] Ford variously asserts that its putative compliance with industry custom and government standards "precluded any award of punitive damages," Pet. 23, that "punitive damages are altogether barred when the defendant has complied with industry standards or federal regulations," *id.* at 20 & n.7, and, because NHTSA has the power to set safety standards and to recall defective products but failed to do so, Congress has impliedly proscribed not only the punitive damages awarded in this case but the compensatory damages as well. *Id.* at 23 & n.9. Indeed, under Ford's theory all motor vehicle products liability suits would be impliedly preempted as NHTSA surely has the power to issue recall in all types of cases. Suffice it to say that Ford's theory is contrary to this Court's decisions in *Silkwood v. Kerr-McGee, Corp.*, 464 U.S. 238, 250-51 (1984)(compliance with government safety standards does not preclude punitive damages in a common law tort action); *Geier v. Am. Honda Motor Corp.*, 529 U.S. 861, 886 (2000)(common law tort claims preempted only because specific federal regulations directly conflicted with state tort law); *Sprietsma v. Mercury Marine*, 123 S.Ct. 518, 527 (2002)(federal agency's inaction does not preempt common law tort claims). Nor do the six cases Ford cites, Pet. 20, n.7, support its claims that compliance with industry or government standards is an absolute

Tellingly, Ford fails to discuss the key facts that the court below decided, after a conscientious *de novo* review, were predicates for its conclusion that Ford had "act[ed] with flagrant indifference to the lives of its consumers," 14a, indifference that prompted the judgment that Ford's conduct was "substantial[ly]" "reprehensib[le]." 17a. Thus, although Ford claims that it was but should not have been punished for its "*mere awareness* of the safety tradeoff posed by the C-6 transmission and alternative design," Pet. 22 (emphasis added), and for its supposed reasonable, "*good-faith* attempt to minimize competing safety risks," Pet. 23 (emphasis added), it was not punished for either its "mere awareness" or its "good faith." Rather, Ford was held liable for punitive damages not because of the company's faint cognizance that somewhere, somehow, some day, some people might be inconvenienced or even slightly hurt by C-6 equipped vehicles, but because—over a period of ten years—Ford had been repeatedly and "forcefully informed" (both by "many of its consumers, some of whom [had been] maimed and killed," and by leading members of its

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bar to punitive damages as a matter of law; instead, all that those cases say is that compliance is one of many factors to be considered, and never the sole or dispositive one. Other courts have routinely rejected Ford's contentions. *See, e.g., OCF Corp. v. Golightly*, 976 S.W.2d 409, 411 (Ky. 1998)(punitive damages not precluded by compliance with industry standards); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1458 (10th Cir. 1985)(same re federal safety standards); *Gonzales v. Surgidev Corp.*, 899 P.2d 576, 590-91 (N.M. 1995)(same); *Mulhern v. Outboard Marine Corp.*, 432 N.W.2d 130, 135 (Wis. Ct.App. 1988)(same). Perhaps the best evidence that vast majority of courts have not barred punitive damages even if a defendant actually complied with industry government standards is that tort "reform" advocates are continually urging Congress and state legislatures to enact provisions like the one presently before the 110th Congress in H.R. 5, §7(c) which would preclude punitive damages if pharmaceutical manufacturers have complied FDA regulations. *E.g.*, Peter W. Huber: LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 48 (1988)("The law today can be very simply stated: Advance regulatory approval . . . counts for nothing definite in [a] subsequent lawsuit."

engineering staff) that C-6 transmissions were ticking time bombs, and Ford still did nothing. 17a.

Thus, Ford was not "merely aware" that sometime, something might go awry; rather, it "was well aware" that the C-6s were very dangerous. 14a. Thus, Ford did not make "simply . . . mak[e] a good-faith election among competing designs," Pet. 24; rather, it acted with "malice" and thus made willful, wanton, intentional decisions to do nothing for ten years, nothing except to count the dead and injured and pay off millions in punitive damages and millions more in compensatory damages and settlements instead of implementing the design change that the "Principal Engineer" in Ford's "Safety Systems Department" had recommended in 1972. 31a, n.2. In sum, Ford was assessed punitive damages in this case not for "mere awareness" and "good-faith" choices, but for substantial knowledge, for flagrant, malicious, intentional indifference and misconduct in light of that knowledge, and for the deadly effects of that indifference and misconduct.

Ford's characterization of its "underlying" conduct as a mere "non-intentional tort[]," Pet. 21, and its contention that its "good faith line-drawing decisions evince [d] diminished reprehensibility" rather than establishing the "'intentional malice'" that *BMW* recognized as being "particularly reprehensible" and deserving of punitive damages, *id.* at 25, quoting *BMW*, 517 U.S. at 576, is similarly at odds with the record. As noted above in Section II, the jury was specifically instructed that it could award punitive damages only if the "plaintiff[s] . . . prove[d] malice,"—with "'*[m]alice' mean[ing]* either conduct which [was] *specifically intended* by Ford . . . to cause tangible or intangible injury to the plaintiff or conduct that [was] carried out by Ford . . . both with a flagrant indifference to the rights of the plaintiff *and subjective awareness* that such conduct will result in human death . . . " – and if the Respondents did so "with clear and convincing evidence."

71a, 72a (emphasis added). And the jury specifically so found. 72a-73a.

In this light, Ford's conduct meets every one of the three "aggravating factors" that *BMW* recognized as "associated with particularly reprehensible conduct": (1) a design that had a substantial "effect on [its product's] performance or safety features"; (2) it acted not only with "indifference to or reckless disregard for the health and safety of others," but proven "intentional malice"; and (3) the harm was not "purely economic in nature" but death. 517 U.S. at 576.[15]

In sum, although there certainly may be cases in which certiorari might be warranted because a defendant has been assessed punitive damages for "mere awareness" and "good-faith" decisions in a mere "non-intentional" tort, the facts of this case establish that it does not fall within that category.

B. The Court Below Properly Applied *BMW's* Ratio Guidepost, and the Five-to-One Ratio in This Case Is Neither Too High Nor Unusual

BMW's second guidepost for determining whether a punitive damages award is "unreasonable or excessive" requires reviewing courts to compare such awards to both

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[15] Finally, Ford raises the specter that unless this Court reverses the decision below, "then the first *BMW* guidepost [will] offer[] no limiting value at all in products cases, with every manufacturer in America subject to an eye-popping punitive damage award any time a jury disagrees *ex post*" with a manufacturer's allegedly "good-faith assessment of product design risks and benefits." Pet. 24. The risks of that calamity occurring are minuscule, not least because this case marks only the second time in 33 years that Ford has been assessed punitive damages in a C-6 related case. Judge Posner and other scholars agree that the empirical evidence shows that punitive damages are awarded in less than 1% of ordinary personal injury cases, *see, e.g.*, Deborah Rhode, *Legal Scholarship*, 115 Harv. L. Rev. 1327, 1361 & n.120 (2002); Herbert Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases*, 51 DePaul L. Rev. 219, 237 (2001), and in even less than one percent of products liability cases. *See, e.g.*, William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW 304-07 (1987); Theodore Eisenberg, *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623, 635-37 (1997); BJS Bulletin, *Civil Justice Survey*, 1 (2000).

"the actual harm inflicted on the plaintiff," and the potential "harm likely to result from the defendant's conduct." 517 U.S. at 580, 581. Applying that test, the court below observed that, on one the one hand, "[i]t would be impossible to overstate the degree of harm" to Tommy Smith and his estate: to him, a painful, crushing death; to his Estate and family, "the total destruction of his power to labor . . . earn money" and provide love and companionship. 17a. On the other hand, the court below noted that "substantial compensatory damages [of $3 million] were awarded" and the $20 million in "punitive damages [awarded by the jury] was almost seven times compensatory damages." 17a-17b. Balancing these and other factors, the court below decided to trim $5 million (or 25%) from the jury's punitive damages award, 20a-21a, leaving a five-to-one ratio of punitive to compensatory damages, a ratio well below those upheld by this Court prior to *BMW* and routinely upheld by federal and state appellate courts in products liability, and personal cases since *BMW*.[16]

Ford nevertheless urges this Court to grant certiorari in this case, arguing that the court below "eviscerated" the ratio guidepost, Pet. 27, because it failed to realize that this case supposedly did not involve the kind of "'egregious' . . . intentional misconduct'" at issue in *Haslip, TXO*, and *BMW*, Pet. 26, quoting *BMW*, 517 U.S. at 582, but mere garden-variety negligence. *Id.* In Ford's estimation, its negligence produced a simple personal injury, one that was readily

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[16] *See e.g., Clark v. Chrysler Corp.*, 310 F.3d 461, 482 (6th Cir. 2002)(applying Kentucky law; *12:1* ratio justified because defective product caused death); *Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159, 1165–66 (10th Cir. 2000); *12:1* ratio warranted because "the [toxic tort] injury is hard to detect [and] the monetary value of noneconomic harm . . . [is] difficult to determine"); *Davis v. Rennie*, 264 F.3d 86, 116 (1st Cir. 2001); *10:1* ratio; assault and battery caused "significant actual and potential [physical] harm"); *Axen v. Am. Home Prods., Inc.*, 974 P.2d 224, 243 (Or.App. 1999), *cert. denied*, 528 U.S. 1136 (2000); *8.3:1* ratio; defective product caused blindness); *Barnett v. La Societe Anonyme*, 963 S.W.2d 639, 669 (Mo.App. 1997) *7.8:1* ratio; product caused death).

discerned, and one that was more than adequately redressed by a "high" compensatory award of $3 million, and thus did not warrant a "high" five-to-one ratio. *Id.* Ford's petition should be denied, though, because it is Ford, not the court below, that misreads the applicable *BMW* standard and Ford that misportrays the facts of this case—including the crucial fact that the jury and courts below concluded that Ford had acted with intentional malice.

As an initial matter, although Ford correctly notes that "[t]his Court has considered the application of [the ratio] guidepost only in cases involving intentional wrongdoing," Pet. 26, it neglects to note that unlike the three pre-*BMW* cases it cites for the proposition that a State's legitimate interest in punishment and deterrence may be satisfied by low ratios or even no punitive damages at all, *id.* at 27 & n.11, every post-*BMW* court that has considered the issue has concluded that ratios higher than the one at issue here are often needed to adequately punish and deter. *See* note 19, *supra*. Significantly, these courts have explained that high ratios are not only not inconsistent with *BMW* but compelled by this Court's "view[s] that some wrongs"—such as violent crimes and torts that result in physical injuries—"are more blameworthy than others," *BMW*, 517 U.S. at 575, that torts involving "intentional misconduct" "are more reprehensible than negligence," *id.* at 576, and that "intentional malice" that produces a substantial "effect on [a product's] performance or safety features" and causes injuries that are not "purely economic in nature" are "particularly reprehensible." *Id.*

Ford's depiction of both the compensatory damages award and the five-to-one ratio in this case as "high" is as tenuous as its scholarship. Ford does not explain why it portrays the $3 million compensatory award for causing the painful death of a young husband and father as "high," and, indeed, the fact that Ford never contested the size of that award and has paid that judgment, suggests that Ford

never thought it was high at all. Nor does Ford explain why a five-to-one ratio is too high for a wrongful death case in which the jury and court below found clear and convincing evidence that Ford's decades-long actions implicated every one of the previously discussed "aggravating factors associated with particularly reprehensible conduct." *BMW*, 517 U.S. at 526. Importantly, Ford also fails to explain why, where, or how this Court should draw the "mathematical bright" line it has eschewed in *BMW*, 517 U.S. at 583, *TXO*, 509 U.S. at 458, and *Haslip*, 499 U.S. at 18.[17]

C. The Punitive Damages Award Was Comparable to Other Penalties That Had Been or Could Be Imposed

In *BMW*, this Court stated the "[e]lementary notions of fairness . . . dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose," as measured by, *inter alia*, either "the difference between this

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[17] Finally, although Ford obliquely raises the general prospect that unreasonably high ratios in some cases might lead to some amount of "overdeterrence" and might produce a punitive award that "cannot be justified by reference to a State's legitimate interests," Pet. 27-28 & n.11, there is certainly no evidence that Ford has been overdeterred regarding C-6 transmissions. Anything but. Tommy Smith's death could have been avoided if Ford had done any one of three things: (1) heeded its customers' complaints, and its own engineers' warnings and recommendations, and redesigned C-6 transmissions before one was installed in the 1977 truck that killed him; (2) voluntarily recalled the defective transmissions and retrofitted the safer design features that Ford installed in new vehicles beginning in 1980; or (3) taken the steps to ensure that every owner and foreseeable user of a C-6-equipped vehicle had received adequate warning and that every such vehicle displayed such warnings for the benefit of those drivers who were not registered owners. Ford took none of those steps, despite the fact as early as 1986, it was reporting to its stockholders and the SEC that it faced $1.6 million in claims, RA-24-25, despite the fact that it had already been forced to pay out in $11,418,000 in three verdicts and 22 public settlements of those claims, and despite the fact that it had already been obliged to pay $400,000 in compensatory damages and $4 million in punitive damages in a C-6 related case eleven years before Mr. Smith was killed. *Ford Motor Co. v. Nowak*, 638 S.W.2d 582 (Tex.App.1982).

remedy and the civil penalties authorized or imposed in comparable cases," 517 U.S. at 574-75, *or* a "[c]ompari[son] [between] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. In the court below, Ford focused initially and most extensively on this Court's first articulation of the third excessiveness guidepost—the "civil penalties authorized or imposed in comparable cases"—explicitly inviting the comparison of the punitive damage awards in this case to those awarded in other Kentucky cases. Thus, Ford began by asserting "*Kentucky's prior jury verdicts provided no warning* to Ford that it might be subjected to a $20 million penalty for offering the same type of product as its competitors sold. . . . (See Tab 2)." Appellee/Cross-Appellant Ford's Brief to Ky. Sup. Ct. (filed Oct. 2, 2000) (Ford Br.) at 51-52. "Tab 2" formed the longest portion of Ford's Brief, a 33-page analysis of 113 cases in which Ford "compar[ed] the $20 million punitive damage award in this case with other awards upheld by" Kentucky appellate courts "and federal courts interpreting Kentucky law . . . as early as 1830." *Id.*, Tab 2: Preface.

The court below accepted Ford's invitation to undertake this case-by-case comparison but reached a contrary conclusion, explaining that "[w]hile Ford is correct that our decision in *Hanson v. American Bank,"* 865 S.W.2d 302 (Ky. 1993)(upholding $5 million in punitive damages), "is the largest award ever finally affirmed by Kentucky courts, it is also true that this Court has in recent years encountered punitive damages in several cases and shown no particular disinclination to uphold such awards where the evidence justified it." 19a & n.43 (citing cases).[18] Thus, the court

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[18] Inasmuch as *BMW* does not forbid extraterritorial comparisons, just extraterritorial punishment, Ford also had notice from: (a) other punitive damage awards in cases involving C-6-related transmissions, *see, e.g., Ford Motor Co. v. Nowak,* 638 S.W.2d 582 (Tex.App.1982)($400,000 in compensatory damages, $4 million in punitive damages; 10:1 ratio)(in Ford's motion for a JNOV (filed July 28,

below held that "Ford had fair warning that it might be subjected to a significant penalty in a Kentucky court." 18a.

Having failed to receive the response it sought from its invitation, Ford now seeks certiorari on the untenable ground that the court below should not have accepted the invitation Ford implored it to take, but, instead, should have focused exclusively on Ford's alternative theory, that the punitive damages awarded by the jury should have been voided because the "maximum civil penalty" authorized by Congress is only 1/25 the size of that award and because the only "criminal sanction authorized by the Kentucky legislature is but 1/1000 of the penalty imposed in this case." Ford Br. at 51 (citing K.R.S. §534.050(1). *See* Pet. 29.

There are three reasons why the Court should decline certiorari on these grounds. First, if error was made by the court below it was error expressly invited by Ford, which, as noted above, specifically asked that court to undertake exactly the award-by-award comparison that Ford now conveniently disowns and disdains. Ford Br. at 51-52 & Tab 2. Ford also protests the time frame used by the court below in making comparisons, castigating that court because it "referred to several Kentucky verdicts awarding punitive damages in wholly unrelated contexts approximately twenty years after the C-6 transmission in this 1977 pickup

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1997) at 78-79, Ford calculated that the $4 million award in *Nowak* was equivalent to $16 million in 1997 dollars); (b)punitive damage awards in other products liability cases against Ford, *see Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal.App. 1981)($128 million in punitive damages for exploding Pinto fuel tanks remitted to $3.5 million)); *Ford Motor Co. v. Stubblefield*, 319 S.E.2d 470 (Ga.App.1984)($8 million punitive damages award); *Miles v. Ford Motor Co.*, 914 S.W.2d 135 (Tex. 1995)($10 million in punitive damages vacated on jurisdictional grounds); and, most pertinently, (c) punitive damages of sorts awarded against Ford in Kentucky a year before Mr. Smith was killed, a case in which Ford was sued by two survivors of a school bus crash that killed 27 students. According to a prize-winning journalist who reviewed the award, $8 million of the $10 million award was for punitive damages. James S. Kunen, RECKLESS DISREGARD, 305-06, 336-37 (1994).

was produced." Pet. 29. Ford thinks this was a cardinal constitutional sin, because "by finding fair notice in jury verdicts rendered years after the conduct at issue, the decision below eviscerates the comparable fines guidepost." *Id.* at 28. Even accepting the fiction that Ford's duties to consumers, and its relevant "conduct," ends when one of its vehicles leaves the plant gates, in comparing the award in this case to post-1977 cases the court below was once again simply doing what Ford invited it to do, because 53 of the 113 cases discussed in Ford's brief to court below were post-1977 cases, including 15 cases that were published after Mr. Smith was killed in 1993. Ford Br., Tab 2, at 1-32. Under the "invited error" doctrine, *see* in Section I, *supra*, Ford is estopped from raising both of these arguments and from seeking certiorari on these grounds.

Second, although Ford contends that the approach taken by the court below has no basis in *BMW*, Ford is plainly wrong. Thus, in accepting Ford's invitation to make an award-by-award comparison, the court below: (a) relied upon *BMW*'s guidance about "'civil penalties . . . imposed in comparable cases,'" 18a (quoting 517 U.S. at 575); *see* 17a, n.37 (citing *BMW* and *Cooper*); (b) sensibly followed this Court's guidance that "penalties" can "take the form of legislatively authorized fines *or* judicially imposed punitive damages," *BMW*, 517 U.S. at 572 (emphasis added); and (c) made the invited comparisons. Importantly, numerous other *post-BMW courts* have followed Judge Posner's lead and used the identical approach as the court below. *See, e.g., Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir. 1996)(Posner, J.)("Neither the size of the awards nor their ratio . . . is out of line with comparable cases.").[19]

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[19] *See also EEOC v. Harbart-Yeargin, Inc.*, 266 F.3d 498, 516-17 (6th Cir. 2001); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 598 (5th Cir. 1998); *Sabir v. Jowett*, 214 F.Supp.2d 226, 247 (D. Conn. 2002); *Niebur v. Town of Cicero*, 212 F.Supp.2d 790, 823-24 (N.D. Ill. 2002); *LaFate v. Chase Manh. Bank (USA)*, 123 F.Supp.2d 773, 790 (D.Del. 2000); *Valle v. Nat'l Basketball Assn.*, 42 F.Supp.2d 334, 345-46

Third, although Ford fancies that its intentional misconduct was not "criminally sanctionable at all under the laws of Kentucky," Pet. 29, and that even if it was the "maximum *penalty* for any felony is [a] $20,000" fine, *id.* (emphasis added), Ford is wrong on both counts. K.R.S. §500.080(12) defines a corporation as a "person," and K.R.S. §507.040 prescribes that "[a] person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including . . . situations where the death results from the person's operation of a motor vehicle." Furthermore, although Ford is correct that even a conviction for a felony like manslaughter could lead to a fine no larger than $20,000, Ford is mistaken in thinking that a fine is the only weapon in Kentucky's legislative arsenal. Thus, the Kentucky Constitution, §205, commands that the legislature "shall . . . provide for the revocation or forfeiture of the charters of all corporations guilty of abuse or misuse of their corporate powers, privileges or franchises, or whenever said corporations become detrimental to the interest and welfare of the Commonwealth or its citizens." Pursuant to that grant of power, the legislature has authorized the attorney general to seek and circuit courts to order the dissolution of a corporation and revocation of its charter for "abuse of the authority conferred upon it by law," K.R.S. §271B.14-300(1)(b), including "corporate liability" if the "conduct constituting the offense is engaged in, authorized, commanded or wantonly tolerated by the board of directors." K.R.S. §502.050(1)(b). Ford's conduct qualifies as "abuse" and, as such, exposes Ford to having its charter forfeited or revoked.

CONCLUSION

The petition for a writ a certiorari should be denied.

(S.D.N.Y. 1999); *Baker v. Nat'l State Bank*, 801 A.2d 1158, 1169-71 (NJ App. 2002); *Stroud v. Lints*, 760 N.E.2d 1176, 1182-84 (Ind.App. 2002).

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April 7, 2003

APPENDIX

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A. Relevant excerpts of trial transcript, 41st Judicial Circuit Court, Civil Action No. 94-CI-00167

Cross-Examination of Melvin Richardson, Engineer, Engineering Design, Inc., by Lionel Hawse, Counsel for Defendant, Ford Motor Co., June 24, 1997, Regarding Ford's Stipulation that it Was "On Notice" Regarding C-6 Related Accidents.

[Mr. Hawse]: What did happen was, Ford was on notice that people were alleging that they put the gear shift into park and it "jumped out of park and went into reverse". Mr. Richardson *(TIME: 16:28:33)* will concede and has conceded in depositions in this case that no Ford transmission of any type when put into the, that's design nominal when put into park will "jump out of park and go into powered reverse". We have in our motion in limine, if notice is just the issue, we are willing to stipulate that Ford was on notice, that people were alleging that these events occurred. Mr. Madden is exactly right, Ford is a responsible company and when these complaints came in they did start investigating to see if there was some malfunction or defect in the system. They investigated it a long period of time before the federal government stepped in. The federal government stepped in and conducted what they concede was the most expensive, biggest investigation they ever ran and never found a defect in the transmission. Now, certain changes were made to attempt to uh---give the, give the operator a sense of security in getting to park, but what they found was a lot of the cases were not broken, not park reverse cases, but just transmission problems. A lot of cases were going down the road and the vehicle did something that they thought was different. A lot of cases *(TIME: 16:29:59)* where somebody bumped the gear shift lever. A lot of cases there were broken parts. There were many causes of this, but nobody ever came up with a "design defect in the transmission", and that is what they are trying to do is they are trying to paint

with this big broad brush that thousands of these cars were jumping out of park because of some design problem. That is incorrect.

Tape 41-97-VCR-042-A-1, 16:28:58-16:29:09 (Tr. Vol. II, 178:7-9)

Direct Examination of Wayne Napier, Vice President, Sand Hill Energy Corp., by Rickey Bailey, Counsel for Plaintiff, Estate of Tommy Smith, June 26, 1997, Regarding the Circumstances of the Death of Tommy Smith.

A. From the other side it appeared that he was setting on the bumper, so I just got in my truck; I had the door open on my pick up and I just got scooted in my truck and drove around to the corner of the trailer *(TIME: 09:13:48)* to where, like the corner of the trailer here and drove around to where he was at and when I pulled up I seen that the truck was against him, against the trailer and I jumped out of my pick up and the Ford truck that he was using was setting there; I seen quiver in the truck you know like when I run to him and I run as hard as I could and jumped in the truck, and I did not look at no gear shift; I just grabbed it and jerked it down in gear and pulled it away from him.

Q. Was the truck running?

A. It was running; the truck was running.

Q. Was the door open or closed?

A. The door was open and I pulled away from it and then run to him as hard as I could and hollered for them other two that was over there a working on that back dump.

Q. And what did you do then?

A. We tried to give them CPR and stuff which I take eight hour course ever year of renewal course of CPR and stuff which all the employees do.

Q. Did you check to see if he had a pulse at that time?

A. Yes, I did.

Q. Was he breathing at that time? *(TIME: 09:14:52)*

A. Yes.

Q. What happened next? Did you all call the ambulance or what?

A. We called Red Bird uh—ambulance service and they was down there in just like a matter of very short minutes cause it's only like six miles from there to the Red Bird Ambulance Service.

Q. Did the ambulance people take him somewhere?

A. They took him to Memorial Hospital here at Manchester.

Q. Did you follow them over or come over?

A. Yes I did.

Q. Do you know about what time it was when they got to Memorial Hospital?

A. No, I don't, but it was fast.

Q. Alright. Did they, I assume they took him to the hospital to do medical treatment on Mr. Smith?

A. yes.

Q. And at some point in time were you informed that the had died?

A. Yes.

Direct Examination of Frederick W. King, Engineer, Ford Motor Co., by Lionel Hawse, Counsel for Defendant, Ford Motor Co., July 8, 1997, Regarding the Number of Ford Vehicles with C-6 Transmissions.

Q. How many, how many C-6 transmissions were on the road at that time frame?

A. Recognizing that the C-6 came out in 1966, it would be several million.

Tape 41-97-VCR-053-A-11, 15:12:19-:26 (Tr. Vol. IX, 1290:8-:11).

At the Start of the Punitive Damage Phase, July 11, 1997, Regarding Trial Court's Warnings to Ford About "Opening the Door" to Discussion of the NHSTA Report and Underlying Data.

By the Court: As to Mr. Richardson other incidences where he has personally examined one hundred of these, I think that's admissible. Cooper I'm ruling out as I did previously. NHTSA I don't think you can get into the actions, the conclusions of NHTSA without getting into all of it. I think once you open it up, you open it up. Now, that leaves us from a procedural standpoint of where we go from here. If Mr. Hawse is avowing to the court that he's going to get into that, then I'll let the plaintiffs get into the whole report. Cooper is out though. I just think that is an isolated incident, and I just can't give that any scientific validity at all.

Mr. Bailey: Well, is he gonna get into it or not? Because I need to know for the questions I will ask Mr. Richardson.

Mr. Madden: And for opening statement. (*TIME: 10:52:42)*

Mr. Hawse: Well, I would like for the court to outline what your, what your position is on each of these points, and then I would like to have an opportunity to have a strategy session for a few minutes with my--

By The Court: Well I think I've outlined my position.

Mr. Hawse: Well, you have outlined your positions thus far, and in particular the point you just raised was that if we open up the door to NHTSA then everything about NHTSA comes in. You haven't addressed---

By The Court: I think you have to open that door first.

Mr. Hawse: Pardon me?

By The Court: I think you have to open that door first.

Tape 41-97-VCR-055-A-13, 10:51:53-17; 10:53:08-15 (Tr. Vol. A, p. 99:9-13; 100:11-12).

Oral Motion for Directed Verdict by Defendant, Ford Motor Co., July 11, 1997, at the Close of Plaintiffs' [Respondents'] Case in the Punitive Damages Phase.

> [Mr. Cowgill]: Your honor, comes the defendant, *(TIME: 14:39:27)* Ford Motor Company and moves for the entry of a directed verdict in its favor on the Plaintiff's claim for punitive damages. The plaintiff has now announced that it has closed all evidence that it intends to offer in support of its claim for punitive damages.
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> * * *
>
> Likewise when you turn to the amount of punitive damages, they have given the jury no information, data or numbers from which the jury could return any meaningful punitive damages award in this case that has some evidentiary basis. They knew that they needed to do that. They knew that was required of them, and that is why the plaintiffs as part of their prima facia case attempted to put in numbers through Mel Richardson, but for whatever reason, whether it was because they had not properly identified him as an expert on that point or for whatever, the fact of the matter is now that they didn't do any such numbers. We have no information on cost differences. We have no information on number of vehicles, nothing from which the jury can do any such kind of math. You have no other basis for the jury to fix any concept of punitive damages. As a result we are in a situation right now Judge where if this case goes to the jury on punitives, whatever number it would come back with would be completely out of the blue and subject to extreme attack on appeal for being just completely speculative and without foundation in the evidence. As I say they knew they needed to offer that kind of *(TIME: 14:50:02)* evidence.

Tape 41-97-VCR-055-A-13, 14:48:42-59, 14:49:26-34 (Tr. Vol. B, 225:1-5, 15-17).

Cross-Examination of Lee Carr, Mechanical Engineer, Carr Engineering, Inc., by R. Scott Madden, Counsel for Plaintiff, Estate of Tommy Smith, July 16, 1997, Regarding the Total Number of Incidents/Accidents and Deaths Concerning C-6 and C-6 Related Transmissions.

Q. According to the NHTSA report that you've talked about here today and about the settlement which you made reference, how many incidents did Ford Motor Company report to NHTSA that had occurred of unintended park to reverse movement involving C-4, C-6 and FMX transmissions prior to the beginning or at least during the conduct and ongoing NHTSA investigation? How many *(TIME: 15:35:29)* incidents were reported?

A. I don't remember a number, but a lot.

Q. Would you agree sir that some nineteen thousand or twenty-three thousand total incident reports were made known to NHTSA?

A. No. That's completely false.

Q. Are you---are you aware sir that as of the end of the NHTSA investigation some two hundred deaths had been connected to unintended reverse in Ford vehicles?

A. There were some people who made that claim, but the records show that wasn't true. There were in fact however, a substantial number meaning, probably more than a hundred where people had been killed, received fatal injuries in events where Ford vehicles moved for a variety of reasons, they were struck or hit or injured over about a ten year time period.

Q. And you agree sir with the safety engineering principle that any risk of serious personal injury or death is always unreasonable and always unnecessary if an economically feasible and technologically feasible alternative safety design existed, don't you?

A. I agree with that in a general sense. Yes sir.

Q. You would agree sir, would you not, that nobody is perfect? *(TIME: 15:36:40)*

A. Of course.

Q. No company is perfect?

A. Of course.

Q. No designer is perfect?

A. Of course.

Q. No design team is perfect?

A. Of course.

Q. Design teams have numerous members?

A. Sure.

Q. Members come and go over the years?

A. Of course.

Q. Who made the ultimate, final decision to not retro-fit the pre-1980 model vehicles? Who made the final call?

A. There was no single individual. I was one of a group of about a hundred people involved in that and we all came to that conclusion within the Ford Motor Company. There were at least a dozen in the agency, national Highway Traffic safety administration that I knew of that considered that and also said don't do that; that isn't right.

Q. Do you agree or disagree with the statement of Fred King in this court that he has never known of a Ford design defect that made it into production, do you agree *(TIME: 15:37:28)* with that? There's never been a Ford design defect that made it into production?

Mr. Hawse: I object, that's an improper characterization of the testimony your honor.

By The Court: Overruled.

A. I don't know what Fred King said, but as I have testified here I, myself, have recalled vehicles that had design defects.

Q. Design defects?

A. Sure. Yes sir. Design defects can arise and that has arisen in my view and I've had experience with that and I've recalled them because of it.

Q. Okay. Did you not sir testify in the case of Hulsey v. Ford Motor Co. ... in response to the question about the NHTSA report that was rendered, did you not say I am aware of a report written in 1980 that said there was, and I'm aware of a report written in 1980 that said there was not, both, talking about a defect, both written by employees of the [NHTSA] as a part of the totals in regard to the claim that there were 23,468 incidents involving Ford vehicles, and you answered yes, there had been twenty-three; was there 23,468 vehicles, and did you answer that question yes?'

A As you read it, but what you said was were there reports that said that was true and were there reports that said it wasn't true, and the answer to that question just as I gave it is yes. You asked me a different question, that is it true that there are twenty-three thousand? There are not. That is not true.

Tape 41-97-VCR--56-A-14, 15:35:20-15:39:10 (Tr. Vol.A, 432:8-17, 434:14-435:11).

Closing Argument for the Plaintiff, the Estate of Tommy Smith, During the Punitive Damages Phase of the Case, by Rickey Bailey, July 16, 1997, Regarding Ford's Purpose of Punitive Damages.

Anyway the first thing I want to tell you is I agree with Mr. Hawse, (1) *this is not about compensating the estate of Tommy Smith. This is about determining whether or not Ford should suffer some type of punishment for their conduct.* (2)*The only way you can punish a company or a corporation that I know of is to punish them in a monetary sense.* You have to make them pay. (3) *They are in business to make money. If they have to pay out money for damages and for punitive damages then they will take that into* consideration as part of their business making, *(TIME: 16:51:20) decision making process.* Again it's

not about Tommy Smith. It's about whether or not Ford acted properly.

We again go to the chronology of events in this case. The 1977 F-250 Ford pick-up truck was a 1977, but I believe the testimony was that it was purchased in January of 1978. Fifteen years later it killed Tommy Smith. We know those are facts and those are not in dispute. What happened prior to that, what happened after that? You've got the jury instructions here and I'm going to go over them with you, and tell you what I think the proof is on these jury instructions. (4) *You've got to remember that the purpose of punitive damages is to deter future misconduct by Ford or others like Ford. An award of punitive damages sends out a signal to the industry, (TIME: 16:52:53)* not just to Ford, but to everybody, all the companies look at that.

* * *

Ford knew in the early seventies again they had problems and didn't do anything. Mr. Carr comes here today and says I was responsible for doing the investigation and I determined there was nothing wrong with this vehicle. He still won't admit that these pre-eighty transmissions had a defect in them that was killing and hurting people. He still won't admit that. Even though he comes in and tells you they made changes that reduced this type of rearward and unintended movement, and he talked about the manual valve, rooster comb, the stuff in the transmission, and that's what we said all the time. It's the stuff in the transmission, and you know what he calls it. He says this is not something to correct a defect. He called that (pause) a product improvement. Now, I've heard taxes called revenue enhancers and that sounds better than a tax, but it's the same thing. Product improvement. He still won't admit it. Ford still won't admit it because it would cost them a lot of money to go back and correct this deficiency. They still won't admit it. I submit to you that by your verdict

here today they'll take another look at these cases and maybe they'll do something. (5) *That's the purpose of punishment, to deter this conduct* (TIME: 16:59:32) *in the future, and to deter it as best they can for future injuries or death and destruction. That's the purpose of punitive damages.*

* * *

If you look at the jury instructions it talks about malice. You've got to make a determination first of all as to whether or not the conduct of Ford Motor Company was with flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm, and that's totally your decision, totally within your discretion. (6) *If you make that finding then you've got to determine whether or not you are going to punish Ford* with an aware of compen--, *with an award of punitive damages* in such amount that it will deter future misconduct. That's what you have to determine.

Tape 41-97-VCR-057-A-15, 16:49:40-:51:56, 17:01:53-:02:09.

Closing Argument for the Plaintiff, the Estate of Tommy Smith, During the Punitive Damages Phase of the Case, by Rickey Bailey, July 16, 1997, Regarding Ford's "Flagrant Indifference" and Its Liability for Punitive Damages.

If you look at the jury instructions they talk about flagrant disregard. Flagrant disregard, flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm. Flagrant indifference. Let's call a committee and talk about it and forget about it and hope this thing goes away. We will design out the defect starting in 80' and it will go away. *We won't have to worry about those millions and millions of vehicles* (TIME: 16:56:23) *already on the road that*

> *are backing up and running over people and causing death and destruction.* How many of those incidents were reported? More than twenty-three thousand. This is in the 1980 NITSA report. How many people were killed allegedly? In the hundreds. Now, is that not flagrant indifference to the rights of the people on the highway? Purchasers, consumers. It just doesn't have to be the purchaser. If you buy a car you may have children. You may have a wife. You may have grandparents that come and visit. . . . It's designed to protect all the folks is what it is.

Tape 41-97-VCR-057-A-15, 16:55:50-16:57:09 (Tr. Vol. A-1, 33:17-33:3)(emphasis added).

Closing Argument for the Plaintiff, the Estate of Tommy Smith, During the Punitive Damages Phase of the Case, by Rickey Bailey, July 16, 1997, Regarding Plaintiffs' [Respondents'] Counsel Suggestion that $45 Million Would Be Appropriate Award of Punitive Damages

> I would suggest, if you determine that Ford acted with malice, and that's up to you, then you have to determine what amount of money would it take to punish *(TIME: 17:05:36)* Ford? You have to come up with a figure, a figure I would suggest to you is based upon the following: This truck was bought in 1978, fifteen years later, thirteen years after Ford made the changes in 1980, this truck killed Tommy Smith. You have awarded Tommy Smith's estate three million dollars. I would suggest to you that a reasonable figure would be three million dollars times fifteen years or forty-five million dollars. That would be a reasonable figure I would suggest. However, it doesn't matter what I suggest. It's totally up to you. If you determine they acted with malice. You can award one dollar, five hundred million dollars, whatever you want to, and certainly whatever decision you make on

that the plaintiff will accept. That is just a figure that I would suggest to you.

B. Internal Ford Documents Referencing the Number of C-6 Related Accidents and Debate About Whether Design Changes or Other Actions Needed to be Implemented. #1 of 4

Inter Office Communication Product Development Group

December 8, 1971

Mr. A.T. Bryant

cc. J. W. Guterman
H. A. Nickol
O. K. Walthall

Subject: Shift Lever and Transmission Engagement Park to Reverse

The purpose of this letter is to alert you to the increasing number of customer complaint letters pertaining to the transmission control operation and recommend consideration of a design revision. The primary mode of an alleged performance problem occurs when the customer leaves the vehicle with the engine running, thinking he has moved shift lever into "park" position, and the transmission subsequently engages in reverse. We are now receiving approximately six letters per month of this type.

The attached customer letter from Mrs. Leo Applegarth is typical of those received. The conclusion that the "reverse" to "park" detent travel is marginal deserves consideration as the 1972 Cadillac shift travel from "park"

to "reverse" is noticeably greater than that noted on Ford vehicles.

It is requested that any design, tooling and cost implications of an increased travel for "reverse" to "park" detent be established jointly with the Transmission Division for possible incorporation in forward designs.

D.R. Dixon, Principal Engr.
Chassis Safety Engrg. Dept.

Concur: J.L. Martin, Manager

Attachment

#2 of 4

Inter Office Communication Product Development Group

January 13, 1972

Mr. J.W. Guterman

cc A.W. Alexandrowicz
J. L. Martin
O. K. Walthall

Subject: Shift Lever and Transmission Engagement – Park to Reverse

Reference: Mr. D.R. Dixon's Communication of 12-8-71, Same Subject

The purpose of this communication is to inform you of the action being taken on the subject problem. Our investigation of service complaints and complaint vehicles shows that this problem is the result of the customer not placing the shift lever in the detent plate slot for the park position. When the shift lever is not placed in the slot, engine vibration can cause the lever to fall back into the reverse position and result in the car moving rearward.

The basic linkage design is such that we have linkage stretch to insure we always pull the transmission fully into the park detent prior to reaching the slot in the detent plate. To eliminate the condition where the customer does not fully reach the slot in the detent plate, we are investigating two alternate designs. One design which can be incorporated without transmission change is to angle the detent plate between reverse and park and also angle the tang of the shift lever. This will result in

the shift lever always having to climb uphill to slip back into reverse when not fully engaged in the park slot. In addition, the two angular surfaces will automatically hold whereas the present flat surfaces can slip due to engine vibration.

The second approach which would require a transmission revision increases the angular travel between reverse and park. This will give us a larger band to work with and permit us to incorporate a double step on the detent plate to catch the lever if it should not be placed in the slot by the customer.

We plan to have the first proposal formulated into a study package for the Study Committee by 2-1-72. Based on cost and vehicle tryout, we will determine if the first proposal is satisfactory. If this is satisfactory, the second proposal will not be pursued past the layout stage.

A.T. Bryant

#3 of 4

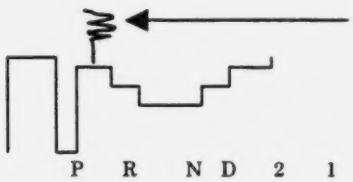
Inter Office Communication Product Development Group

June 30, 1972

Mr. H.A. Nickol
Mr. M.L. Jurosek
Mr. P.D. Fadow
Mr. A.T. Bryant

Subject: Steering Column Transmission Control Detents

Current Chassis shift lever detent design permits transmission lever placement on a "land" between a positive park position and reverse position with the possibility of vehicle vibration moving the lever from park to reverse in an unattended vehicle.



Shift lever-spring loaded against plate in improper position which appears to customer as proper.

Present Condition

Present customer usage patterns indicate that this condition of careless shift lever actuation is occurring frequently in the field with actual high accident incidence.

It is recommended that forward design and development be directed toward a feasible alternative which positively positions shift lever in park or reverse to prevent a false sense of security as to transmission position.

D.R. Dixon, Principal Engineer
Chassis Safety Systems Department

Concurred: J.L. Martin, Manager

#4 of 4

HOTLINE

Transmission Division

Date: November 28, 1972 Code No._____

To: D.C. Hewitt R.W. Smith W.E. Wright C. Tant
W.R. Strandt G.W. Schulz T.P. Monaghan
R.J. Gavin

SUBJECT:

Automatic Transmissions "Jumping Out of Park"

COMMENTS:

The Critical Product Problem Committee has been investigating claims of auto transmissions jumping out of park. The investigation to date has shown all three transmissions (C6, C4, FMX) are involved and the problem is generally across all car lines and does not show any particular trend as to assembly plant, geographical location, time of year, or sex of driver. As a result the Committee has arranged an audit of AAD linkage adjustment setting. Transmission Division is participating (W. Mahler at Los Angeles Pre-Delivery Center-1972). In addition, I have requested Livonia, Fairfax, and Sharonville to audit their mechanism checks and submit a report by Dec. 4, 1972. In the last 2 weeks' meeting, 6 additional cases have been reported.

FMX	1972 Ford	11,000 miles	"Jumped out of park"
C4	1972 Torino	8,972 miles	"Came out of park"
C4	1972 Montego	2,675 miles	"Came out of park hit tree"
C6	1972 Ford	10,900 miles	"Jumped out of park into reverse"
C6	1971 Ford	20,074 miles	"Jumped out of park into reverse"
C6	1969 Mercury	40,400 miles	"Jumped out of park into reverse"

Closed ف Next Reporting Date __ Signature B. Stapleton

C. SAE "Recommend[ation]" Regarding Providing a "Standard Pattern or Sequence for . . . Automatic Transmissions"

AUTOMATIC TRANSMISSIONS — MANUAL CONTROL SEQUENCE — SAE J915
SAE Recommended Practice

Report of Transmission and Drivetrain Committee approved July 1963.

Purpose and Scope The purpose of this SAE Recommended Practice is to provide a standard pattern or sequence for the manual control of automatic transmissions in passenger cars or light duty trucks.

This recommendation pertains particularly to automatic transmission of the hydrodynamic drive type. However, it could serve equally well for other types, such as mechanical, electrical or hydrostatic. It is primarily applicable to passenger cars and light duty trucks; but if applicable, it could be used on other vehicles.

Steering Column Mounted Control Lever The general pattern or sequence shall be:

P R N D L

where the letters stand for Park, Reverse, Neutral, Drive, and Low, respectively.

The Park position shall be located as shown when provided; however, inclusion of such position is optional.

For detecting the positions by feel and for safety a stepped gate shall be provided, such that the control lever must be raised in a direction parallel to the axis of the steering column in order to engage certain of the manual positions. While a definite gating pattern is not specified, a preferred one is as follows:

N and D on one plane: raise to obtain either R or L, and, if a Park position is included in shifting R to P, a further rise with P being a latched position.

Floor or Panel Mounted Control Lever The general pattern or sequence shall be:

P R N D L

Adequate gating as mentioned under "Column Mounted Lever" should be provided. A level with a button release for entering Reverse, Park, and/or Low is a desirable feature. Park should be a latched position but its inclusion is optional.

Push Button Manual Control Arrangement There is no preferred pattern. A recommendation is made that the N and R buttons be well defined and separated from the buttons selecting forward speeds.

Variations If differences such as dual driving range selection or the choice of specific ratios are provided, then these can fit into the recommended sequence. For example:

P R N D_2 D_1 L	P R N D 2 1
P R N DRIVE L	PARK R N D S L

Inhibitors For three speed automatic gear boxes, the inhibiting of a 3-1 shift is recommended above vehicle speeds which would cause engine over-speed and/or severe braking. No recommendation is made on a 3-2 inhibitor. Either mechanical or hydraulic inhibiting is acceptable and recommended for all types of controls.

Engaging of the Parking position (if included) is mechanically inhibited by means of the gating mentioned above. Further, if Park position is engaged with vehicle moving, the mechanism must ratchet or not engage until a low (0-5 mph) vehicle speed is attained.

Neutral Safety Switch A switch in series with the starter circuit is recommended to prevent the starting of the engine in any driving position. This switch should allow the engine to be started only in the N and P (if included) positions.

D. Affidavit of Robert G. Grant, Memorandum in Support of Ford Motor Company For Judgment Notwithstanding the Verdict, or Alternatively, For a New Trial, Clay Circuit Court Civil Action No. 94-CI-00167 (July 28, 1997), Regarding How Often Ford Prevailed in C-6 Related Cases Tried to a Verdict.

COMMONWEALTH OF KENTUCKY
CLAY CIRCUIT COURT
CIVIL ACTION NO. 94-CI-00167

ESTATE OF TOMMY SMITH, ET AL. PLAINTIFFS

VS.

FORD MOTOR COMPANY DEFENDANT and THIRD-PARTY PLAINTIFF

VS.

SAND HILL ENERGY, INC. THIRD-PARTY PLAINTIFF

AFFIDAVIT OF ROBERT G. GRANT

Robert G. Grant, being duly sworn, hereby deposes and says:

1. I am attorney licensed to practice law in the states of Michigan, New York, and California. Since December 1980, I have been employed by Ford Motor Company ("Ford") as an attorney in its product litigation group.

2. From December 1980 until the present, I have been one of the attorneys responsible for managing product litigation involving allegations that Ford transmission control systems are defectively designed because of the potential for misshifting and subsequent inadvertent vehicle movement. In this affidavit, I will refer to this litigation as "transmission litigation" or "transmission cases."

3. After I became responsible for transmission litigation in December 1980, I familiarized myself with the results in the transmission cases that Ford had tried before that date. Further, I am personally familiar with the results in transmission litigation after December 1980.

4. Ford has prevailed in more than 74% of the transmission cases it has tried since 1977 involving vehicles with C6, C4, and FMX transmissions. In these cases, juries in Arkansas, California, Florida, Iowa, Louisiana, Michigan, Mississippi, Missouri, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas have all returned verdicts in favor of Ford. Half of these cases involved vehicles with C6 transmissions, the same type of transmission at issue in the present case. In many of these cases, juries returned special verdicts expressly finding that the vehicles involved were not defective.

/s/_____
Robert G. Grant

Subscribed to and sworn before me

This ___day of July, 1997

FRANCES MARY KLEABIR

Notary Public
Notary Public, Wayne County, Michigan
My Commission Expires December 17, 1998

E. Relevant Excerpt of Ford's 1985 10-K Report to the SEC

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.
20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1984
Commission file number 1-3950

FORD MOTOR COMPANY
(Exact name of registrant as specified in its charter)

Delaware	38-0549190
(State of incorporation)	(I.R.S. Employer Identification No.)

The American Road, Dearborn, Michigan	48121
(Address of principal executive offices)	(Zip Code)

Registrant's telephone number, including area code 313-322-3000

* * *

Item 3. Legal Proceedings

Product Matters

In addition to the case involving allegedly defective automatic transmissions specifically described above, Ford is a defendant in various other cases alleging the Ford's design of automatic transmissions and/or their shift selector mechanisms permit vehicles to move after being placed in park. The damages specified by the plaintiffs in the complaints in these additional actions,

including both actual and punitive damages, aggregated approximately $1.6 billion at February 6, 1985. (In some of the foregoing actions no dollar amount of damages is specified or the specific amount referred to is only the jurisdictional minimum.) In addition to the pending actions, accidents have occurred and claims have arisen which also may result in lawsuits involving these vehicles.

F. Settlements and Awards Involving C-6 Related Park to Reverse Defect

S=Settlement; V=Verdict

$4,400,000	V	*Nowak v. Ford Motor Co.*, 638 S.W.2d 582 (Tex. Ct. App. 1982) ($400,000 pecuniary; $4,000,000 punitive).
$1,255,000	V	*Ford Motor Co. v. Burdeshaw*, 661 So. 2d 236 (Ala. 1995).
$ 250,000	V	*Lenhardt v. Ford Motor Co.*, No. C80-1835 (W.D. Wash. 1980).
$ 800,000	S	*Thornberry v. Ford Motor Co.*, No. 79C1-3350 (Ky. Cir. Ct. Fayette Co. 1979).
$ 789,000	S	*Skipper v. Ford Motor Co.*, No. 786399 (S.D. Fla. 1978) (present value in 1983).
$ 514,000	S	*Grider v. Ford Motor Co.*, No. 269685 (Cal. Super. Ct. 1977).
$ 500,000	S	*Moore v. Ford Motor Co.*, No. 79-3022 (Fla. Cir. Ct. Polk Co. 1979).
$ 488,000	S	*Heather v. Ford Motor Co.*, No. 79-L-6 (Ill. Cir. Ct. Madison 1979).
$ 400,000	S	*Chapman v. Ford Motor Co.*, No. 793090 (D. W. Va. 1979).
$ 350,000	S	*Fager v. Ford Motor Co.*, No. 794021 (E.D. Ill. 1979).
$ 300,000	S	*Sanches v. Ford Motor Co.*, No. CA 3790917F (N.D. Tex. 1979).
$ 225,000	S	*Look v. Ford Motor Co.*, No. 80-125-0RL (D. Fla. 1980).
$ 150,000	S	*Miller v. Ford Motor Co.*, No. 79CV-8597 (Colo. D. Ct. Denver Co. 1979).
$ 115,000	S	*Morley v. Ford Motor Co.*, No. 780402 (D. Utah 1978).
$ 105,000	S	*Compton v. Ford Motor Co.*, No. 7826333 (Tex. D. Ct. Nueces Co. 1978).

$ 104,500	S	*Downey v. Ford Motor Co.*, No. 81-4108 (D. Kan. 1981).
$ 100,000	S	*Barker v. Ford Motor Co.*, No. 79-935420 (Mich. Cir. Ct. Wayne Co. 1979).
$ 97,500	S	*Sweat v. Ford Motor Co.*, No. 80 SP25 ((S.C. Common Pleas Hampton 1980).
$ 85,000	S	*Lehman v. Ford Motor Co.*, No. 798001 (Fla. Cir. Ct. Broward Co. 1979).
$ 75,000	S	*Hughes v. Ford Motor Co.*, No. CA 19753 (N.D. Tex. (Abilene) 1979).
$ 75,000	S	*Smith v. Ford Motor Co.*, No. 791333 (D. Ga. 1979).
$ 70,000	S	*Selle v. Ford Motor Co.*, No. 7925C1 (D. Fla. 1979).
$ 60,000	S	*Ulmer v. Ford Motor Co.*, No. 78-818-299 (Mich. Cir. Ct. Wayne Co. 1978).
$ 55,000	S	*Harrington v. Ford Motor Co.*, No. CIVS 80199 (E.D. Cal. 1980).
$ 55,000	S	*Nedimyer v. Ford Motor Co.*, No. 794406 (W.D. Penn. 1979).

G. Jury Instructions in *Ford v. Smith* and *Pacific Mut. Life Ins. Co. v. Haslip*

Jury Instructions in *Ford v. Smith*

If you are further satisfied from the evidence that Ford Motor Company acted toward Tommy Smith with malice, you may in your discretion award punitive damages against Ford Motor Company in addition to the damages you have already awarded. The plaintiff must prove malice with clear and convincing evidence, and you may consider the evidence introduced in the first phase of this trial as well as the second phase of this trial.

As used in this instruction:

(a) "Malice" means either conduct which is specifically intended by Ford Motor Company to cause tangible or intangible injury to the plaintiff or

(b) Conduct that is carried out by Ford Motor Company both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

If you award punitive damages in determining the amount thereof, you should consider the following factors.

(a) The likelihood that at the relevant time that serious harm would arise from Ford Motor Company's misconduct;

(b) The degree of Ford Motor Company's awareness of that likelihood;

(c) The profitability of the misconduct to Ford Motor Company;

(d) The duration of the misconduct and any concealment of it by Ford Motor Company;

(e) Any actions by Ford Motor Company to remedy the misconduct once it became known to Ford Motor Company.

Jury Instruction in *Pacific Mut. Life Ins. Co. v. Haslip*

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [*sic*] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.

Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.

499 U.S. 1, 6 n.1 (1991).

Supreme Court, U.S.
FILED
APR 7 2003
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No. 02-1096

In The
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

vs.

ESTATE OF TOMMY SMITH, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Kentucky

BRIEF OF TWENTY LEADING NON-AUTOMOTIVE COMPANIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are twenty leading non-automotive companies that represent a wide spectrum of American businesses. Many of the *amici* are manufacturers, engaged in the production of agricultural supplies, aircraft, chemicals, cigarette lighters, consumer glass products, diesel engines, earthmoving and construction equipment, first aid supplies, garbage trucks, home appliances, industrial equipment, medical devices, personal hygiene products, personal watercraft, pharmaceuticals, pens, plastic products, sporting goods, and truck trailers. Other *amici* are involved in oil and gas exploration, transportation and disposal of hazardous materials, and interstate rail freight transportation. Collectively, the *amici* provide goods and services that are indispensable to consumers and beneficial to the public welfare. Therefore, *amici* are particularly well-suited to explain how the issues presented impact the entire business community.

As the detailed descriptions of the individual companies set forth in the attached Appendix A show, *amici*'s activities are performed in compliance with a wide array of voluntary industry standards and mandatory government regulations. For example, the manufacturing *amici* design and produce their products in accordance with industry customs and standards such as those set by the American National Standards Institute, and in compliance with a

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[1] This brief is submitted with the consent of counsel for all parties. It was authored by *amici* and counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or their counsel made any monetary contributions to the preparation or submission of this brief.

complex array of state and federal regulations promulgated by, inter alia, the Consumer Product Safety Commission, the Food and Drug Administration, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration. The non-manufacturer *amici* are similarly engaged in activities such as oil and gas exploration or the transportation of hazardous materials that are subject to extensive environmental laws and regulations. *Amici*'s activities, by their very nature, carry the potential for serious personal injury, despite *amici*'s best efforts to maximize their safety.

Amici believe that the issues raised in Ford's petition in this case ("*Smith*"), and in the companion case of *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139 (Ct. App. 2002), *petition for cert. filed*, No. 02-1097 (U.S. Jan 21, 2003) ("*Romo*"), affect not only the automotive industry, but all businesses whose activities can potentially cause serious injury. Specifically, *amici* believe that the reasoning of the lower courts in *Romo* and *Smith* conflicts with the reasoning of other opinions and severely undermines the due process protections against excessive punitive damages set forth by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996) ("*BMW*").

SUMMARY OF ARGUMENT

The petition in this case, along with the contemporaneously filed petition in *Romo*, explains that the lower courts in both cases effectively nullified the three-guidepost test set forth in *BMW* for reviewing constitutionally excessive punitive damage awards. *Amici* agree

that all the issues raised in the petition merit this Court's attention. The purpose of this brief is to stress two of those issues.

First, *amici* emphasize the importance of the petitioner's argument concerning the proper interpretation of the first *BMW* guidepost: the reprehensibility of the defendant's conduct. Both in *Romo* and in *Smith*, the lower courts reasoned that Ford's conduct was highly reprehensible *per se* because Ford knowingly manufactured a product that could cause serious injury. The lower courts failed to consider important aspects of Ford's conduct that supported Ford's good faith belief that its conduct was lawful. For example, the courts criticized Ford's product design decisions, but disregarded the fact that Ford complied with applicable regulations and industry standards. And the courts criticized Ford for failing to change or recall its products, but disregarded evidence that supported Ford's determination that no change or recall was necessary, such as the absence of any injuries despite years of use (*Romo*), or findings of no defect by prior juries and the National Highway Traffic Safety Administration (*Smith*).

A company that complies with all applicable regulations and industry standards should have some assurance that its conduct will not be deemed highly reprehensible, even if a jury later determines in hindsight that the company is liable for a personal injury. This is especially true in cases where the company operates in a highly regulated environment. The mere occurrence of injury should not be an indicium of reprehensibility. Instead, the focus should be on the defendant's state of mind when the conduct occurred.

As this brief explains, however, companies like the *amici* are constantly faced with the threat of punitive damages under these or similar circumstances. *Amici* respectfully request that this Court grant certiorari and resolve a conflict in the lower courts regarding the proper application of the first *BMW* guidepost. Specifically, *amici* ask this Court to hold that, when applying the first *BMW* guidepost, courts must consider *all* factors bearing on the reprehensibility of the defendant's conduct, including facts showing a good faith basis for the defendant to believe its conduct was lawful.

Second, *amici* emphasize the importance of petitioner's argument concerning the third *BMW* guidepost: comparison of the punitive damage award to statutory civil and criminal penalties for comparable misconduct. This Court explained in *BMW* that reviewing courts should accord "substantial deference" to statutory penalties because they constitute legislative determinations of the appropriate sanctions for misconduct. Nonetheless, as the petitions explain, the lower courts in *Romo* and *Smith* declined to compare each punitive damage award to the applicable statutory penalties for similar misconduct. The *Romo* court declared the third *BMW* guidepost inapplicable because Ford's conduct arguably was punishable by imprisonment. The *Smith* court looked only to other punitive damage awards instead of deferring to *legislatively* established penalties.

Amici will demonstrate that giving the third *BMW* guidepost short shrift is a national trend reaching epidemic proportions. Appendix B to this brief compiles information about federal and state appellate cases applying *BMW* to punitive damage awards of $1 million or more. Appendix B demonstrates that courts are routinely

affirming multi-million dollar punitive damage awards without giving any weight to *BMW*'s third guidepost.

Amici respectfully request that this Court grant certiorari and end the pervasive disregard of the third guidepost. Specifically, *amici* ask this Court to explain that courts cannot disregard the third guidepost when legislatively established penalties for comparable misconduct are small or non-existent. To the contrary, in such cases, courts should treat the third guidepost as a meaningful limitation on the size of a punitive damage award, because the applicable statutory penalties afforded no fair notice of a massive monetary sanction.

STATEMENT OF THE CASE

Amici hereby adopt and incorporate by reference the Statement of the Case set forth in Petitioner's Brief.

ARGUMENT

I.

THE MISAPPLICATION OF *BMW*'S "REPREHENSIBILITY" GUIDEPOST EXPOSES BUSINESSES TO ENORMOUS PUNITIVE DAMAGE CLAIMS AND AWARDS.

In both *Romo* and *Smith*, the lower courts failed to meaningfully apply the first *BMW* guidepost: the degree of reprehensibility of Ford's conduct. Instead of examining Ford's actual conduct in choosing a particular product design, the courts simply observed that Ford knowingly made a product with a potential for causing serious injury,

and concluded that this conduct was sufficiently reprehensible to support an enormous punitive damage award.

Amici are deeply concerned by the reprehensibility discussion in *Romo* and *Smith*. As explained more fully in the *amici curiae* brief filed by the Product Liability Advisory Council, et al., *Romo* and *Smith* confuse intentional conduct (intentionally manufacturing a product that is involved in an injury) with intentional harm (intentional injury), thereby exposing all companies whose activities may cause personal injury to enormous punitive damage awards. Many of the *amici* are manufacturers who make a wide variety of products, both for individual and industrial consumers. Most of these products, by their very nature, carry the potential for personal injury. When a product is sold to millions of consumers, even the tiniest probability of injury may result in a large number of injuries. The National Safety Council's annual publication of injury information in the United States reports literally thousands of annual injuries associated with such everyday products as shoes, coins, luggage, skateboards, sleds, hand saws, hammers, drills, pliers, wire cutters, wrenches, screwdrivers, batteries, household containers and packaging, bottles, jars, tableware, scissors, trash baskets, beds, tables, chairs, ladders, rugs, toilets, mirrors, bathtubs, showers, nails, screws, windows, refrigerators, irons, vacuum cleaners, and fans. National Safety Council, Injury Facts 134 (1999 ed.).

Other *amici* are not manufacturers, but similarly engage in activities that, although beneficial, have the potential for causing personal injury, such as oil and gas exploration and the transportation of hazardous materials. If merely manufacturing a product or engaging in an activity with a potential for causing serious injury is, in

and of itself, highly reprehensible, then the *BMW* reprehensibility guidepost will never constrain excessive punitive damage awards in cases against companies like the *amici*. They will be vulnerable to enormous punitive damage awards whenever serious injury occurs, despite the impossibility of making any product injury-proof in all circumstances of use, and despite manufacturers' inability, once they have sold a product, to control the circumstances of use.

Amici believe that *Romo* and *Smith* merit this Court's review because they are extreme examples of the disregard of the reprehensibility guidepost. Not only was there no showing of conscious disregard for safety, but the lower courts ignored *multiple* circumstances showing diminished or no reprehensibility. First, with respect to Ford's product design, the courts ignored Ford's compliance with industry customs and regulatory safety standards. Second, with respect to Ford's alleged failure to change or recall its products, the courts ignored the fact that the product was widely used with no evidence of other injuries (*Romo*), and the fact that juries and administrative bodies had found the product not defective (*Smith*). The evidence affirmatively indicated that Ford, like the defendant in *BMW*, had a good faith basis for believing its conduct was lawful. *See BMW*, 517 U.S. at 576-79.

Although *Romo* and *Smith* are extreme examples, they are not the only examples. *Amici* constantly face cases in which they are subjected to or threatened with punitive damages under some of the same circumstances.

For example, in 1997, *amicus* CSX Transportation ("CSXT") was assessed with a then-unprecedented *$2.5 billion* in punitive damages by a New Orleans jury in

connection with a tank car fire that occurred after the car was left at CSXT's facility. CSXT's allegedly "reprehensible" conduct was its failure to discover that the tank car was leaking a combustible substance. However, in affirming a remitted $850 million punitive damage award, the Louisiana Court of Appeal gave no weight at all to the undisputed evidence that CSXT's tank car inspection practices conformed with all federal and other legal requirements, were fully consistent with industry standards of good practice, had never resulted in a tank car accident at the facility except for the accident at issue, and that CSXT had been commended by the New Orleans City Council for its conduct in connection with the fire. *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 373, 375 (La. Ct. App. 2001), *petition for cert. dismissed per stipulation*, Louisiana Supreme Court No. 2001-C-2485.

ExxonMobil recently was assessed *$1 billion* in punitive damages in a case involving a parcel of land that allegedly was contaminated with a naturally occurring radioactive byproduct of oil drilling. *See Grefer v. Alpha Technical*, No. 97-15004 (La. Civ. Dist. Ct.). The Louisiana Department of Environmental Quality determined that there were no emissions of radioactive materials in the air or ground, and that the site was not a hazard to neighborhood residents, but the jury awarded $1 billion and the trial court denied ExxonMobil's posttrial motions. That case is currently pending on appeal in Louisiana state court. The award should be reversed under a proper application of *BMW*, but ExxonMobil is concerned that the reasoning of *Romo* and *Smith* could undermine the due process protections set forth in *BMW*.

In *Waddill v. Anchor Hocking, Inc.*, 27 P.3d 1092 (Or. Ct. App. 2001), *petition for cert. filed*, No. 02-370 (U.S. Sept. 3, 2002), Anchor Hocking was assessed $1 million in punitive damages for failing to warn that a glass fishbowl might break. *Id.* at 1093-94. In reviewing the award under *BMW*, the Oregon Court of Appeals discussed that Anchor Hocking had never received any civil or criminal punishment relating to its manufacture of fishbowls. *Id.* at 1098-99. (The court did not discuss that no civil or criminal penalties exist for the conduct at issue and that the nearest comparable penalties are small.) This should have led the court to conclude that Anchor Hocking neither deserved punishment nor had fair notice of a $1 million punishment; instead, as in *Romo*, the court cited the absence of any civil or criminal punishment as grounds for *affirming* the award. *Id.*

Other *amici* have been threatened with enormous punitive damages in cases involving some of the same elements appearing in *Romo* and *Smith*. For example, Whirlpool recently was sued for an alleged defect in a dishwasher that supposedly caused a fire. The suit sought punitive damages, even though the dishwasher complied with all industry and Underwriters Laboratory standards and was subjected to extensive preproduction and production testing. *See Trinidad v. Whirlpool Corp.*, No. CIV 00-1435 (D. N.M.). Great Dane Trailers faces one punitive damage lawsuit after another alleging that the rear impact guards on its truck trailers are either too strong or not strong enough, even though the guards comply with National Highway Traffic Safety Administration regulations, as well as voluntary industry safety guidelines. *See, e.g., Rapp v. Singh*, 152 F. Supp. 2d 694, 696-98 (E.D. Pa. 2001). Bombardier, Inc. repeatedly faces punitive damage lawsuits alleging that the steering systems on its personal

watercraft are defective, even though those systems fully comply with U.S. Coast Guard safety requirements. *See, e.g., Barnett v. Bombardier, Inc.*, No. 00-5726-L (Tex. 9th Jud. Dist.). These companies have prevailed in these cases thus far, but they face the prospect of successive lawsuits based on the same kinds of allegations, and will be at perpetual risk of punitive damages under *Romo* and *Smith*.

Some of the *amici* are pharmaceutical companies concerned about the threat of enormous punitive damages for alleged defects in drugs, even though the drugs have been subjected to extensive testing and have been approved by the Food and Drug Administration. Such lawsuits include the recent claim for $560 million in compensatory and punitive damages against Bayer for alleged defects in the anticholesterol drug Baycol. *See* Melody Petersen, *Bayer Cleared of Liability in a Lawsuit Over a Drug*, N.Y. Times, Mar. 19, 2003 at C1. A jury cleared Bayer of all liability, but the mere possibility that a $560 million award *could* be imposed and upheld caused Bayer's stock to drop over thirty-seven percent. *Id.* Despite Bayer's win, the plaintiffs' counsel has publicly declared that this is just the beginning of a series of lawsuits in various jurisdictions across the country. *Id.*

Similarly, the *amici* who make heavy equipment are concerned that, under the reasoning of *Romo* and *Smith*, they may face the same predicament as Crown Equipment Corporation, which was recently assessed with $1.25 million in punitive damages for alleged defects in a stand-up lift truck. *McEuin v. Crown Equip. Corp.*, No. CV-97-00365 (D. Or.), *appeal docketed*, No. 00-36043 (CA9 2001). The evidence at trial showed that the design met universally followed industry practices and complied with standards

promulgated by the U.S. military, the American National Standards Institute, and the Occupational Safety and Health Administration. Despite all of this evidence, the trial court denied Crown Equipment's posttrial motions. The case currently is pending before the U.S. Court of Appeals for the Ninth Circuit.

Finally, many businesses face similar problems in the context of current asbestos litigation, where companies that did not manufacture asbestos, but merely used asbestos-containing materials in their factories decades ago, are vulnerable to enormous punitive damages. *See, e.g., U.S. Steel Loses Asbestos Lawsuit*, L.A. Times, Mar. 31, 2003 at C1 (discussing a $200 million punitive damage award based on U.S. Steel's use of asbestos-containing insulation in one of its plants).

In sum, *amici* all are affected by the issues raised in *Romo* and *Smith* regarding the proper application of the reprehensibility guidepost in cases involving serious personal injury. *Amici* respectfully request that this Court grant certiorari to clarify that the existence of serious personal injury does not make a company's conduct highly reprehensible *per se*. To determine whether the defendant's conduct was highly reprehensible, courts must consider a variety of factors, including whether the risk of injury was unreasonable, whether the defendant understood the risk before engaging in the conduct, whether the defendant consciously disregarded or actively concealed the risk for the purpose of causing harm, whether the defendant complied with applicable regulations and industry standards, and whether juries or regulatory bodies had previously determined that the defendant's conduct was not punishable.

II.

CONFUSION ABOUT THE PROPER INTERPRETATION OF *BMW*'S "CIVIL AND CRIMINAL PENALTIES" GUIDEPOST HAS BECOME EPIDEMIC.

As the petitions explain, the lower courts in *Romo* and *Smith* practically ignored the third *BMW* guidepost: comparison of the amount of punitive damages with civil and criminal penalties for comparable misconduct. This is not unusual. State and federal courts are badly split on the proper application of the third *BMW* guidepost, with many courts simply choosing to ignore it altogether.

This Court explained in *BMW* that, when applying the third guidepost, appellate courts "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." 517 U.S. at 583 (internal quotations omitted). This concept, which was not part of the traditional post-verdict review of punitive damages prior to *BMW*, was one of the most significant aspects of the *BMW* opinion. *See* Paul M. Sykes, Note, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in* BMW v. Gore, 75 N.C. L. Rev. 1084, 1112 (1997) (stating that the third guidepost, unlike the others, "adds a new tool to the toolchests of lower courts"). *But see Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 671-72 (N.M. 2002) (criticizing this Court's adoption of the third guidepost and describing it as the "least important indicium" of excessiveness).

Unfortunately, since *BMW*, most appellate courts have not accorded *any* deference, much less substantial deference, to legislative judgments concerning the appropriate

sanctions for misconduct. This trend continues even after this Court's decision two years ago in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), which adopted a *de novo* standard of review for application of the *BMW* guideposts and specifically observed that the third *BMW* guidepost, compared to the first two, "seems more suited to the expertise of appellate courts." *Id.* at 440.

Appendix B to this brief lists the federal and state appellate cases that have considered the constitutionality under *BMW* of a punitive damage award of $1 million or more.[2] Nearly forty percent of these cases (39 out of 101) did not even state whether legislatively established penalties existed for comparable misconduct, let alone accord these penalties substantial deference. Many of these cases upheld seven-figure punitive awards against constitutional attack under *BMW* without even *mentioning* the third guidepost.[3]

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[2] The problem discussed in this section is not limited to the cases with the largest punitive awards. Many appellate courts have affirmed awards under $1 million without discussing statutory penalties. *See, e.g., Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 146 F.3d 983, 993-94 (CADC 1998) (upholding $100,000 award); *Routh Wrecker Serv., Inc. v. Washington*, 980 S.W.2d 240, 244-45 (Ark. 1998) (upholding $75,000 award); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256, 259, 261 (Ga. Ct. App. 1996) (upholding $65,000 award); *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594-95 (Iowa 1999) (upholding $30,000 award); *Garcia v. Coffman*, 946 P.2d 216, 224-25 (N.M. Ct. App. 1997) (upholding $50,000 award); *Bardonaro v. Gen. Motors Corp.*, 2000 Ohio App. LEXIS 3479, at *16-*18 (Ct. App. Aug. 4, 2000) (unreported) (upholding $100,000 award).

[3] *See, e.g., Clark v. Chrysler Corp.*, 310 F.3d 461, 481-82 (CA6 2002); *Cable & Computer Tech. Inc. v. Lockheed Sanders Inc.*, 52 Fed. Appx. 20, 23 (CA9 2002); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235,

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Nearly twenty percent (20 out of 101) of the cases in Appendix B acknowledged that statutory penalties existed, but chose to ignore them. Some courts decided to ignore statutory penalties that they perceived to be too low.[4] Other courts ignored statutory penalties because no government agency ever sought to impose them against the defendant. *See Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1219 (Ala. 1999); *Anchor Hocking*, 27 P.3d at 1099; *see also Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 507 (S.D. 1997). In *Romo*, the court actually concluded that the absence of any prior punishment made a $290 million punitive damage award *more* acceptable. *Romo,* Pet. App. 36a; *see also Anchor Hocking*, 27 P.3d at 1099. Such decisions perversely use legislative judgments that particular conduct does not deserve a heavy penalty as a reason to disregard that judgment and as a license to impose heavy punitive damages.

1252-54 (CA10 2000); *Arrow Int'l, Inc. v. Sparks*, 2003 Ark. App. LEXIS 107, at *19-*20 (Feb. 12, 2003) (unreported); *Notrica v. State Comp. Ins. Fund*, 83 Cal. Rptr. 2d 89, 114, 116-18 (Ct. App. 1999); *Owens-Corning Fiberglas Corp. v. Rivera*, 683 So. 2d 154, 155, 156 (Fla. Dist. Ct. App. 1996); *Bibb Distrib. Co. v. Stewart*, 519 S.E.2d 455, 459 (Ga. Ct. App. 1999); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 147-48 (Iowa 1996); *Cooper Tire & Rubber Co. v. Tuckier*, 826 So. 2d 679, 690-91 (Miss. 2002); *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So. 2d 637, 646-47 (Miss. 1998); *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 589 (Mo. Ct. App. 2001); *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1053 & n.16 (Nev. 2000); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 476 (Or. 1999).

[4] *See, e.g., Union Sec. Life Ins. Co. v. Crocker*, 709 So. 2d 1118, 1122 (Ala. 1997); *Ford Motor Co. v. Sperau*, 708 So. 2d 111, 122 (Ala. 1997); *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 531 (Ala. 1997); *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997); *see also Aken*, 49 P.3d at 672 (deeming low penalties "not helpful" when other guideposts weighed in favor of affirmance).

Some courts, like the Kentucky Supreme Court in *Smith*, 83 S.W.3d at 495-96, ignored comparable statutory penalties and looked only at jury awards in similar cases.[5] Since enormous punitive damage awards were precisely the problem this Court was seeking to rectify when it delineated its three guideposts, reliance on those awards to justify other awards is circular and illogical, effectively rendering the third guidepost meaningless.

Other courts have declared the third guidepost inapplicable when the comparable penalties included imprisonment. *See Romo*, Pet. App. 39a; *Williams v. Philip Morris Inc.*, 48 P.3d 824, 842 (Or. Ct. App. 2002) (observing in connection with plaintiff's argument that defendant's conduct was punishable by imprisonment: "[w]e do not believe that [the third guidepost] plays a major role one way or the other"). Since many torts also constitute crimes punishable by imprisonment, this analysis, too, tends to render the third guidepost meaningless.

Where there are no statutory penalties for comparable misconduct, some appellate courts have simply declared the third guidepost inapplicable.[6] A few courts have

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[5] *See, e.g., O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100, 115 (Ill. App. Ct. 2002) ("Finally, the jury's award is in line with punishment meted out in comparable cases."); *Gregory v. Shelby County, Tennessee*, 220 F.3d 433, 445 (CA6 2000) ("Finally, the third factor provides little guidance in this determination as the parties have provided no evidence of similar jury verdicts on this issue."); *Harris v. Soley*, 756 A.2d 499, 509 (Me. 2000) (acknowledging third guidepost but discussing only cases, not statutory penalties); *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 177-79 (Mo. Ct. App. 1997) (same).

[6] *See, e.g., Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 562-63 (Ind. Ct. App. 1999) ("In this case however there is no comparable civil statutory penalty. . . . The same is true for criminal penalties. Thus this

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reached the opposite conclusion, and treated the third guidepost as an indicium of excessiveness when the legislature has not prescribed any penalties for the conduct at issue. *See, e.g.*, *FDIC v. Hamilton*, 122 F.3d 854, 862 (CA10 1997); *Langmead v. Admiral Cruises, Inc.*, 696 So. 2d 1189, 1194 (Fla. Dist. Ct. App. 1997).

In sum, the lower appellate courts are hopelessly conflicted about the proper interpretation of the third guidepost. The vast majority have simply ignored it or given it short shrift. Those that have considered the third guidepost cannot agree on how it should be applied when statutory penalties are small or non-existent.

Amici respectfully request that this Court grant certiorari to resolve this confusion. Specifically, *amici* ask this Court to explain that the third *BMW* guidepost is essential, not optional, and that when legislatively established penalties for comparable misconduct are small or nonexistent, this guidepost weighs against the imposition of a large punitive damage award.

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portion of the *Gore* indicia of excessiveness is not applicable.") (footnote omitted); *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437, 445 (Miss. 1999) (disposing of third guidepost by stating "there are no other sanctions which would be imposed under the facts of this case"); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 641 N.W.2d 504, 517 (Wis. Ct. App. 2002) ("[W]hen a legislature has not prescribed penalties for the type of conduct engaged in by the defendant, this third guidepost becomes immaterial."), *rev. granted*, 653 N.W.2d 888 (Wis. 2002); *see also Aken*, 49 P.3d at 672 (noting that this Court has been criticized by commentators for failing to " 'give any guidance as to what to do if there are *not* any' " statutory penalties for comparable misconduct).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Allergan, Inc.

Allergan, Inc., headquartered in Irvine, California, is a global health care company that develops and commercializes specialty pharmaceutical products for the opthalmic, neurological, dermatological and other specialty markets. The company is a pioneer in specialty pharmaceutical research, targeting products and technologies related to specific disease areas such as glaucoma, retinal disease, dry eye, psoriasis, acne, photodamage, movement disorders, metabolic disease and various types of cancer. Botox® (also known as Botox® Cosmetic) is currently the company's largest product in terms of sales volume and is widely accepted as the standard therapy for treating neuromuscular disorders and facial lines. Botox® Cosmetic was approved in April 2002 by the U.S. Food and Drug Administration ("FDA") for the temporary treatment of moderate to severe brow furrow lines in adults age sixty-five or younger.

Allergan's pharmaceutical products and biologics are subject to extensive pre- and post-market regulation by state agencies and the FDA, including regulations that govern the testing, manufacturing, safety, efficacy, labeling, storage, record keeping, advertising and promotion of products under the Federal Food, Drug and Cosmetic Act and the Public Health Services Act. Approval by the FDA of a New Drug Application is required prior to marketing a new drug, and approval of a Biologics License Application is required before a biologic may be legally marketed in the United States. The FDA may withdraw approval if compliance with the pre- and post-market regulatory standards is not maintained or if problems occur after the

product reaches the marketplace. The FDA has broad post-market regulatory and enforcement powers, including the authority to levy fines and civil penalties, suspend or delay issuance of approvals, seize or recall products, or withdraw approvals.

The Anchor Hocking Company

Founded in Lancaster, Ohio at the turn of the last century, The Anchor Hocking Company is now a leading producer of consumer glass products, including a wide range of glass tableware and containers.

BASF Corporation

BASF Corporation, the U.S. subsidiary of BASF AG, one of the world's largest chemical companies, produces a wide range of high-performance products, including high-value chemicals, plastics, colorants, pigments, automotive and industrial coatings and agricultural products, which it provides to a wide variety of industries, including the detergent, printing, coating, leather, automotive, oil, and textile industries. BASF Corp. must comply with a broad range of regulatory controls on the testing, manufacture, and marketing of many of its products. In particular, chemical companies have become subject to increasingly stringent legislation and regulations related to occupational health and safety, product registration, and environmental protection.

Bell Sports Corporation

Bell Sports Corporation is the leading manufacturer and marketer of bicycle helmets worldwide and a leading

supplier of a broad line of bicycle accessories in North America. Bell Sports is also a supplier of in-line skating, snowboarding, snow skiing, and water sport helmets. Over its history, Bell Sports has developed a reputation for innovation, design, quality, and safety. Since its founding, Bell Sports has engaged in the manufacture and sale of bicycle helmets, bicycle accessories, auto racing helmets, and motorcycle helmets, but in recent years has elected to refocus its operations on the growing bicycle helmet and accessory business. Bell Sports is subject to many federal, state, and local requirements relating to the protection of the environment.

BIC Corporation

BIC Corporation, headquartered in Milord, Connecticut, is a world leader in stationery products, lighters, and shavers. Its products are distributed in a variety of retail locations from local food and tobacco shops, stationery stores, supermarkets, office retail outlets, superstores, mass merchandisers, and warehouse clubs. Every day the world over, consumers buy: twenty-one million BIC stationery products, four million BIC lighters, and ten million BIC shavers. BIC products are present in five contintents and in more than 160 countries. BIC is the market leader in disposable lighter design, manufacture, and sales and is the only U.S. manufacturer of disposable lighters.

BIC has historically been involved in product liability litigation where claimants have asserted that its lighters are defective. BIC complies with varied government regulations and industry standards.

Bombardier, Inc.

Bombardier, Inc. is a diversified corporation composed of autonomous operating groups that manufacture regional, business and amphibious aircraft, rail transportation systems, and recreational vehicles.

Caterpillar

Caterpillar manufactures a wide range of earthmoving, mining and construction equipment used to build roads, dams, homes, bridges, and other infrastructure. Caterpillar is also the world's largest manufacturer of medium speed engines and high speed diesel engines.

CSX Transportation, Inc.

CSX Transportation, Inc. is the largest rail network in the eastern United States, providing rail freight transportation over a network of more than 23,000 miles in twenty-three states, the District of Columbia, and two Canadian provinces. CSX Transportation is a wholly owned subsidiary of CSX Corporation, which owns other transportation businesses, including an intermodal and trucking company, a container-freight terminal company, and a domestic container-shipping company. CSX Transportation's activities are comprehensively regulated pursuant to the Federal Railroad Safety Act.

The Dow Chemical Company

The Dow Chemical Company ("Dow") is a leading science and technology company that provides innovative chemical, plastic, and agricultural products and services to a wide range of markets that are vital to human progress,

including food, transportation, health and medicine, personal and home care, and building and construction. Dow, like other chemical companies, is subject to increasingly stringent legislation and regulations related to occupational health and safety and environmental protection.

Eaton Corporation

Eaton Corporation, headquartered in Cleveland, Ohio, is a global, diversified, industrial manufacturer of fluid power, electrical distribution, automotive power train and truck drive train systems used to run aerospace systems, off-highway agricultural and construction vehicles, industrial equipment, and passenger cars and trucks.

Eli Lilly and Company

Eli Lilly and Company ("Lilly") is a leader in developing pharmaceutical products, in recent years introducing important new drugs for the treatment of cancer, schizophrenia, osteoporosis, diabetes, cardiovascular complications, and severe sepsis. Lilly introduced the first commercially available insulin product for the treatment of diabetes in 1923 and revolutionized the treatment of depression with the introduction of Prozac® in the late 1980s. The introduction and marketing of Lilly's pharmaceutical products are broadly regulated by the FDA.

ExxonMobil Corporation

ExxonMobil Corporation's principal business is energy, including the exploration for and production of

crude oil and natural gas, the manufacture and transportation of petroleum products, and the sale of crude oil, natural gas, and petroleum products. ExxonMobil's activities are governed by numerous environmental laws and regulations.

Great Dane Limited Partnership

Great Dane Limited Partnership is the largest manufacturer, in terms of total revenues, of truck trailers and intermodal containers and chassis in the United States. Great Dane's principal products include dry freight vans, refrigerated vans, platform trailers, and specialized intermodal containers and chassis used to transport raw materials, industrial supplies, agricultural produce, refrigerated foods, finished goods, electronic equipment, machinery, and steel to warehouses, manufacturing plants, and retail stores. Great Dane's products are subject to regulation by the National Highway Traffic Safety Administration.

Heil Company

Heil Company is a leading manufacturer of front, rear, and side loading trucks used to collect and recycle waste from business and industry, as well as from residential customers.

Johnson & Johnson

Johnson & Johnson is the world's most comprehensive and broadly-based manufacturer of health care products for the consumer, pharmaceutical, and professional markets. Johnson & Johnson's worldwide business is divided into

three segments: Consumer, Pharmaceutical, and Medical Devices and Diagnostics. The Consumer segment's principal products are personal care products, including nonprescription drugs, adult skin and hair care products, baby care products, oral care products, first aid products, women's health products, and nutritional products. Pharmaceutical segment products include antifungal, anti-infective, cardiovascular, contraceptive, dermatology, gastrointestinal, hematology, immunology, neurology, oncology, pain management, psychotropic (central nervous system), and urology treatments. The Medical Devices and Diagnostics segment includes wound care and surgical sports medicine products, as well as disposable contact lenses. Most of Johnson & Johnson's business is subject to the broad regulatory powers of the FDA, which requires increased amounts of testing and documentation prior to the approval and introduction of new drugs and devices.

Monsanto Company

Monsanto Company is a leading global provider of agricultural products and integrated solutions to improve farm productivity and food quality. Monsanto products range from Roundup herbicide to high quality brand name seeds for important food crops such as wheat, soybean, corn, and grain.

Novartis Pharmaceuticals Corporation

Novartis Pharmaceuticals Corporation researches, develops, manufactures, and markets leading innovative prescription drugs used to treat a number of diseases and conditions, including central nervous system disorders, organ transplantation, cardiovascular diseases, dermatological

diseases, respiratory disorders, cancer, and arthritis. The company's mission is to improve people's lives by pioneering novel healthcare solutions. Prescription drugs are subject to broad regulation by the FDA.

Located in East Hanover, New Jersey, Novartis Pharmaceuticals Corporation is an affiliate of Novartis AG, a world leader in healthcare with core businesses in pharmaceuticals, consumer health, generics, eye-care, and animal health.

Unocal Corporation

Unocal Corporation, the parent company of the Union Oil Company of California, is one of the world's leading independent oil and gas exploration, development, and production companies. Unocal's activities are subject to extensive federal, state, and local laws.

Whirlpool Corporation

Whirlpool Corporation is the world's leading manufacturer and marketer of major home appliances. The company's principal products are home laundry appliances, home refrigerators and freezers, home cooking appliances, home dishwashers, room air-conditioning equipment, mixers, and other small household appliances. Whirlpool has been the principal supplier of home laundry appliances to Sears Roebuck and Company under the Kenmore brand name for over eighty years. Whirlpool's manufacturing facilities are subject to numerous environmental laws and regulations. Whirlpool's products, like those of other appliance manufacturers, are subject to regulation by the Consumer Product Safety Commission.

Wilbur-Ellis Company

Incorporated in 1921, Wilbur-Ellis Company is an international marketer and distributor of agricultural and industrial products. A distributor for major chemical companies, Wilbur-Ellis sells animal feed, fertilizer, insecticides, seeds, and machinery throughout North America.

APPENDIX B

Appellate Cases Considering the Constitutionality Under *BMW* of a Punitive Award of $1 Million or More

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
3d Circuit *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446 (CA3 1999)			
$100.6 million	Unfair competition	$500,000 or $1.5 million; disregarded as unhelpful	$1 million
6th Circuit *Clark v. Chrysler Corp.*, 310 F.3d 461 (CA6 2002)			
$3 million	Products liability	Not discussed	$3 million
McHugh v. Olympia Entm't, Inc. 37 Fed. Appx. 730 (CA6 2002)			
$1.2 million	Assault, civil rights violation (minor injuries)	Not discussed	$1.2 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Gregory v. Shelby County, Tennessee, 220 F.3d 433 (CA6 2000)			
$2.2 million	Violation of prisoner's civil rights (death)	Not discussed	$2.2 million
8th Circuit *Morse v. S. Union Co.*, 174 F.3d 917 (CA8 1999)			
$6.25 million	Employment discrimination	Not discussed	$400,000
Watkins v. Lundell, 169 F.3d 540 (CA8 1999)			
$3.5 million	Fraudulent inducement of contract	$10,000	$940,000
Denesha v. Farmers Ins. Exch., 161 F.3d 491 (CA8 1998)			
$4 million	Employment discrimination	Not discussed	$700,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
EEOC v. HBE Corp., 135 F.3d 543 (CA8 1998)			
$4.8 million	Employment discrimination	Not discussed	$480,000
Kim v. Nash Finch Co., 123 F.3d 1046 (CA8 1997)			
$7 million	Employment discrimination	$300,000	$300,000
Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (CA8 1997)			
$50 million	Sexual harassment	$300,000 (federal statute); disregarded as inapplicable to state law claim	$350,000
9th Circuit *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146 (CA9 2002) (on remand)			
$4.5 million	Trade dress infringement	Existence of statutory penalties discussed, but amount not mentioned	$500,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Cable & Computer Tech. Inc. v. Lockheed Sanders Inc., 52 Fed. Appx. 20 (CA9 2002)			
Two awards of $25.7 million	Fraud	Not discussed	Two awards of $12.8 million
In re Exxon Valdez, 270 F.3d 1215 (CA9 2001)			
$5 billion	Oil spill (injury to fishing interests)	$200,000 or double the amount of harm caused	Vacated & remanded
Swinton v. Potomac Corp., 270 F.3d 794 (CA9 2001)			
$1 million	Racial harassment	$300,000	$1 million
Demendoza v. Huffman, 1 Fed. Appx. 665 (CA9 2001)			
$1.1 million	Abuse of process, fraud	Not discussed	$550,000
Ace v. Aetna Life Ins. Co., 139 F.3d 1241 (CA9 1998)			
$16.5 million	Insurance bad faith	$500,000	Vacated & remanded

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
VisionQuest Nat'l, Ltd. v. Marimed Found., 1998 U.S.App. LEXIS 15340 (CA9 July 6, 1998) (unreported)			
$1.75 million	Tortious breach of contract	Not discussed	$1.75 million
Guzman v. Tower Dev., Inc., 1997 U.S. App. LEXIS 36006 (CA9 Dec. 19, 1997) (unreported)			
$4 million	Fraud, conversion	None; guidepost disregarded because no penalties found	$4 million
10th Circuit *Hampton v. Dillard Dep't Stores*, 247 F.3d 1091 (CA10 2001)			
$1.1 million	Interference with contract	None; guidepost disregarded because no penalties found	$1.1 million
Bielicki v. Terminix Int'l Co., 225 F.3d 1159 (CA10 2000)			
$2.04 million	Negligence	$30,000 and one year in prison (federal); $1,000 and revocation of license (state)	$2.04 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (CA10 2000)			
$17.46 million	Products liability (amputation)	Not discussed	$17.46 million
United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207 (CA10 2000), *aff'd*, 532 U.S. 588 (2001)			
$58.5 million	Securities fraud	$2,500,000 (federal) and $750,000 (state)	$58.5 million
Deters v. Equifax Credit Info. Servs., Inc., 202 F.3d 1262 (CA10 2000)			
$1 million	Sexual harassment	$300,000	$295,000
FDIC v. Hamilton, 122 F.3d 854 (CA10 1997)			
$1.2 million	Fraud	None; treated as mitigating factor	$264,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Klein v. Grynberg, 1997 U.S. App. LEXIS 28858 (CA10 Oct. 20, 1997) (unreported)			
$3 million	Breach of fiduciary duty	Not discussed	$600,000
Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634 (CA10 1996)			
$30 million	Interference with contract	"[V]ery large"	$6 million
11th Circuit *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (CA11 1999)			
$45 million	Pollution	$10,000	$4.35 million
Federal Circuit *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335 (CAFed 2001), *petition for cert. filed sub nom. DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, No. 02-130 (U.S. July 24, 2002)			
$50 million	Fraud	Incarceration and fine at discretion of the court	$50 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Alabama			
Acceptance Ins. Co. v. Brown, 832 So. 2d 1 (Ala. 2001)			
$1.2 million	Insurance bad faith	Not discussed	$180,000
Orkin Exterminating Co. v. Jeter, 832 So. 2d 25 (Ala. 2001)			
$80 million	Fraud	$900,000	$2 million
Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166 (Ala. 2000)			
$3 million	Malicious prosecution	Not discussed	$600,000
Prudential Ballard Realty Co., Inc. v. Weatherly, 792 So. 2d 1045 (Ala. 2000)			
$2.5 million	Real estate fraud	Not discussed	$750,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Lance, Inc. v. Ramanauskas, 731 So. 2d 1204 (Ala. 1999)			
$13 million	Wrongful death	Disregarded because fines not sought or imposed	$4 million
McKowan v. Bentley, 773 So. 2d 990 (Ala. 1999)			
$2 million	Wrongful death	None; guidepost disregarded because no penalties found	$2 million
Union Sec. Life Ins. Co. v. Crocker, 709 So. 2d 1118 (Ala. 1997)			
$2 million	Fraud	$2,000; disregarded because too low	$1 million
Ford Motor Co. v. Sperau, 708 So. 2d 111 (Ala. 1997)			
$6 million	Fraud	$2,000; disregarded because too low	$1.79 million
Cherokee Elec. Coop. v. Cochran, 706 So. 2d 1188 (Ala. 1997)			
$3 million	Wrongful death	None; guidepost disregarded because no penalties found	$3 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Am. Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361 (Ala. 1997)			
$2 million	Fraud	Not discussed	$750,000
Talent Tree Pers. Servs., Inc. v. Fleenor, 703 So. 2d 917 (Ala. 1997)			
$3 million	Fraud	2 to 20 years in prison	$1.5 million
Life Ins. Co. of Ga. v. Johnson, 725 So. 2d 934 (Ala. 1998)			
$15 million	Fraud	$1,000; disregarded because too low	$3 million
BMW of N. Am., Inc. v. Gore, 701 So. 2d 507 (Ala. 1997)			
$4 million	Fraud	$2,000; disregarded because too low	$50,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997)			
$4.5 million $3 million $4.5 million $3 million	Fraud	$1,000	$114,500 $60,500 $112,500 $60,500
Arkansas *Arrow Int'l, Inc. v. Sparks*, 2003 Ark. App. LEXIS 107 (Feb. 12, 2003) (unreported)			
$4 million	Wrongful death	Not discussed	$4 million
Edwards v. Stills, 984 S.W.2d 366 (Ark. 1998)			
$1.5 million	Assault, battery, false imprisonment, outrage	Imprisonment for life	$1.5 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
California			
Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139 (Ct. App. 2002), *petition for cert. filed*, No. 02-1097 (U.S. Jan 21, 2003)			
$290 million	Products liability (death)	$10,000 or imprisonment; disregarded as inapplicable to corporation	$290 million
Henley v. Philip Morris, Inc., 2003 Cal. App. Unpub. LEXIS 2699 (Mar. 19, 2002) (unreported)			
$50 million	Products liability, fraud	$6,000 fine per offense; possible total of $6.6 million	$25 million
Earnest v. Truck Ins. Exch., 2002 Cal. App. Unpub. LEXIS 10976 (Nov. 26, 2002) (unreported)			
$30 million	Insurance bad faith	Not discussed	$3 million
Tosco Corp. v. N.H. Ins. Co., 2002 Cal. App. Unpub. LEXIS 10077 (Oct. 30, 2002) (unreported)			
$18.2 million	Insurance bad faith	$10,000 or $55,000 or suspension of license	$4.6 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2002 Cal. App. Unpub. LEXIS 6131 (June 28, 2002) (unreported), *petition for cert. filed*, 02-966 (U.S. Dec. 20, 2002)			
$10 million	Insurance bad faith	$10,000 or $55,000	$1.7 million
Friedman v. Royal Maccabees Life Ins. Co., 2002 Cal. App. Unpub. LEXIS 1701 (May 28, 2002) (unreported)			
$7 million	Insurance bad faith	$10,000 or $55,000 or imprisonment	$7 million
State Comp. Ins. Fund. v. WPS, Inc., 2001 Cal. App. Unpub. LEXIS 2485 (Oct. 22, 2001) (unreported)			
$3 million	Fraud	Not discussed	$3 million
Simon v. San Paolo U.S. Holding Co., 2001 Cal. App. Unpub. LEXIS 1860 (Nov. 7, 2001) (unreported)			
$1.7 million	Fraud	$2,500 or imprisonment	$1.7 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Notrica v. State Comp. Ins. Fund, 83 Cal. Rptr. 2d 89 (Ct. App. 1999)			
$20 million	Insurance bad faith	Not discussed	$5 million
Florida *Langmead v. Admiral Cruises, Inc.*, 696 So. 2d 1189 (Fla. Dist. Ct. App. 1997)			
$3.5 million	Personal injury (minor injury to eye)	None; treated as mitigating factor	None
Owens-Corning Fiberglas Corp. v. Rivera, 683 So. 2d 154 (Fla. Dist. Ct. App. 1996)			
$1.5 million	Products liability (asbestosis)	Not discussed	$1.5 million
Georgia *Time Warner Entm't Co. v. Six Flags Over Ga.*, 563 S.E.2d 178 (Ga. Ct. App. 2002), *petition for cert. filed*, No. 02-978 (U.S. Dec.23, 2002)			
$257 million	Breach of fiduciary duty	Double or treble the amount of harm caused	$257 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Bibb Distrib. Co. v. Stewart, 519 S.E.2d 455 (Ga. Ct. App. 1999)			
$12.5 million	Forgery, theft, conversion	Not discussed	$12.5 million
Idaho *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996)			
$10 million	Fraud, insurance bad faith	Not discussed	$3.2 million
Illinois *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100 (Ill. App. Ct. 2002)			
$2.3 million	Insurance bad faith	Not discussed	$2.3 million
Indiana *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999)			
Two awards of $29 million	Products liability	None; guidepost disregarded because no penalties found	Two awards of $6.9 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Mich. Mut. Ins. Co. v. Sports, Inc., 698 N.E.2d 834 (Ind. Ct. App. 1998)			
$1 million	Insurance bad faith	$200,000	$1 million
Iowa *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996)			
$15 million	Defamation, breach of fiduciary duty	Not discussed	$2 million
Kentucky *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *petition for cert. filed sub nom. Ford Motor Co. v. Estate of Tommy Smith*, No. 02-1096 (U.S. Jan. 21, 2002)			
$20 million	Products liability (death)	Not discussed	$15 million
Ky. Farm Bureau Mut. Ins. Co. v. Rodgers, 2002 Ky. App. LEXIS 1922 (Sept. 13, 2002) (unreported)			
$1 million	Insurance bad faith	Suspension or revocation of license	$1 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Louisiana *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364 (La. Ct. App. 2001)			
$2.5 billion	Mishandling of toxic substance	$1 million fine	$850 million
Maine *Harris v. Soley*, 756 A.2d 499 (Me. 2000)			
$1 million	Int. infliction of emot. distress, conversion	Not discussed	$1 million
Maryland *Bowden v. Caldor, Inc.*, 710 A.2d 267 (Md. 1998)			
$9 million	Malicious prosecution, defamation, false imprisonment	$1 million (maximum fine authorized by any Md. law)	Remittitur reversed & remanded

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Michigan			
Abramczyk v. Southgate, 2002 Mich. App. LEXIS 530 (Apr. 9, 2002) (unreported)			
$19.25 million	Retaliation against whistleblower	Existence of statutory penalties discussed, but amount not mentioned	$1.75 million
Mississippi			
Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679 (Miss. 2002)			
$3 million	Products liability (death)	Not discussed	$3 million
MIC Life Ins. Co. v. Hicks, 825 So. 2d 616 (Miss. 2002)			
$6 million	Breach of fiduciary duty	$5,000	Reversed & remanded
Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437 (Miss. 1999)			
$1.5 million $1.5 million	Wrongful termination	None; guidepost disregarded because no penalties found	$1.5 million $1.5 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637 (Miss. 1998)			
$1.25 million	Insurance bad faith	Not discussed	$1.25 million
Missouri *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575 (Mo. Ct. App. 2001)			
$1 million	Sexual battery	Not discussed	$1 million
Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. Ct. App. 1997)			
$67.5 million	Wrongful death	Not discussed	$26.5 million
Barnett v. La Societe Anonyme Turbomeca Fr., 963 S.W.2d 639 (Mo. Ct. App. 1997)			
$175 million	Wrongful death	Not discussed	$26.5 million

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Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Nevada *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043 (Nev. 2000)			
$6 million	Conversion	Not discussed	$6 million
New Mexico *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662 (N.M. 2002)			
$1.75 million $1 million	Wrongful termination, defamation	$70,000 or $300,000 fines disregarded as not helpful; possibility of incarceration cited as basis for affirming	$1.75 million $300,000
Allsup's Convenience Stores, Inc. v. N. River Ins. Co., 976 P.2d 1 (N.M. 1998)			
$4 million $500,000	Insurance bad faith	Revocation of license	$4 million $500,000
Ohio *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002)			
$49 million	Insurance bad faith	$3,500 and loss of business license	$30 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Wightman v. Consol Rail Corp., 715 N.E.2d 546 (Ohio 1999)			
$25 million	Wrongful death	Prosecution for manslaughter	$15 million
Williams v. Aetna Fin. Co., 700 N.E.2d 859 (Ohio 1998)			
$1.5 million	Fraud	Not discussed	$1.5 million
Oregon *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001)			
$1 million	Unlawful trade practices	Loss of business license and fine up to $25,000	$1 million
Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999)			
$4 million	Products liability (brain damage and paralysis)	Not discussed	$4 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Williams v. Philip Morris Inc., 48 P.3d 824 (Or. Ct. App. 2002)			
$79.5 million	Fraud	Imprisonment; disregarded as inapplicable to corporation	$79.5 million
Bocci v. Key Pharm., Inc., 35 P.3d 1106 (Or. Ct. App. 2001), *petition for cert. filed*, No. 02-342 (U.S. Aug. 30, 2002)			
$35 million $22 million	Products liability (brain damage)	Not discussed	$35 million $22 million
Waddill v. Anchor Hocking, Inc., 27 P.3d 1092 (Or. Ct. App. 2001), *petition for cert. filed*, No. 02-370 (U.S. Sept. 3, 2002)			
$1 million	Products liability (cuts on arms and wrists)	Disregarded because fines not sought or imposed	$1 million
Jensen v. Medley, 11 P.3d 678 (Or. Ct. App. 2000), *review granted*, 52 P.3d 436 (Or. 2002)			
$1.25 million	Retaliation against whistleblower	$1,000 and one year in prison	$175,000

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
MacCrone v. Edwards Ctr., Inc., 980 P.2d 1156 (Or. Ct. App. 1999) (en banc)			
$1.25 million	Intentional infliction of emotional distress	$7,000 and 18 months in prison	$1.25 million
Axen v. Am. Home Prods. Corp., 974 P.2d 224 (Or. Ct. App. 1999)			
$20 million	Products liability (blindness)	$60,000 and injunction against future sales	$20 million
Pennsylvania *Pioneer Commercial Funding Corp. v. Am. Fin. Mortgage Corp.*, 797 A.2d 269 (Pa. Super. Ct. 2002)			
$337.5 million	Conversion	Not discussed	Vacated & remanded
South Carolina *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 2003 S.C. App. LEXIS 17 (Feb. 3, 2003) (unreported)			
$1.57 million	Interference with contract	Not discussed	$1.57 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
Welch v. Epstein, 536 S.E.2d 408 (S.C. Ct. App. 2000)			
$3.9 million	Medical malpractice (death)	Not discussed	$3.9 million
Hundley v. Rite Aid of S. C., Inc., 529 S.E.2d 45 (S.C. Ct. App. 2000)			
$10 million $1 million	Pharmacist malpractice (brain damage)	$500 or 18 month imprisonment plus revocation of license	$10 million $1 million
South Dakota *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493 (S.D. 1997)			
$4.8 million	Fraud	$10,000 and 10 years in prison; disregarded because no charges sought	$1 million
Texas *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1998)			
$4.35 million	Products liability (asbestosis)	None; guidepost disregarded because no penalties found	$3.7 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
N. Am. Refractory Co. v. Easter, 988 S.W.2d 904 (Tex. App. 1999)			
$1.5 million	Products liability (asbestosis)	None; guidepost disregarded because no penalties found	$1.3 million
Harrison v. Querner, 1999 Tex. App. LEXIS 8914 (Nov. 30 1999) (unreported)			
$1 million	Fraud	Not discussed	$1 million
Utah *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, *cert. granted*, 122 S. Ct. 2326 (U.S. June 3, 2002) (No. 01-1289)			
$145 million	Insurance bad faith	$10,000 or loss of business license or disgorgement and treble damages	$145 million

Punitive Damage Verdict(s)	Nature of Conduct	Comparable Statutory Penalties, If Any, Revealed By Opinion	Final Punitive Damages
West Virginia *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678 (W. Va. 1997)			
$1.575 million $1.124 million	Unlawful termination, retaliation	None; guidepost disregarded because no penalties found	$1.109 million $1.124 million
Wisconsin *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 641 N.W.2d 504 (Wisc. Ct. App. 2002), *rev. granted*, 653 N.W.2d 888 (Wis. 2002)			
$3.5 million	Insurance bad faith	None; guidepost disregarded because no penalties found	$3.5 million

No. 02-1096

(4)

Supreme Court, U.S.
FILED
APR 7 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FORD MOTOR COMPANY

Petitioner,

v.

ESTATE OF TOMMY SMITH, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Kentucky

BRIEF OF AMICI CURIAE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Alliance of Automobile Manufacturers, Inc. (Alliance) is a nonprofit trade association composed of 10 car and light truck manufacturers: BMW Group, DaimlerChrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mitsubishi Motors North America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., and Volkswagen of America, Inc. Alliance members account for more than 90 percent of U.S. vehicle sales.

The Association of International Automobile Manufacturers, Inc. (AIAM) is a trade organization whose members include American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Maserati North America, Inc., Mitsubishi Motors North America, Nissan North America, Peugeot Motors of America, Saab Cars USA, Renault, SA, Subaru of America, and Toyota Motor Sales, U.S.A. AIAM also represents original equipment suppliers and other automotive-related trade associations.[1]

The members of the Alliance and AIAM – automotive manufacturers and suppliers – may be the most affected by the punitive damages laws of this country. The products

[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by the Alliance and AIAM and was written entirely by their counsel.

they make – automobiles – move fast and crash, and severe injuries can occur in them in all kinds of ways even when they are perfectly designed. And under principles of both law and engineering, the designs manufacturers choose must reflect judgment calls about risks and benefits, which by definition make risks to some more likely if risks to others are to be avoided. Members of the Alliance and AIAM are frequently sued by injured people who seek, based on their particular injuries, to have their cars deemed defective by lay juries – often advocating as alternatives the very designs attacked by others. And plaintiffs often ask the jury, based on the isolated facts of their case, to punish the manufacturer for design decisions made years (sometimes decades) before.

This scenario is played out again and again, in court after court, state after state, design after design. And the results are, truly, random. Designs deemed non-defective in one case are found defective and punishable in another. And the punitive amounts – although spiraling ever upward – bear no relationship to anything except jury whim.

This Court's cases have sought to clarify the Constitution's limits on the availability and size of punitive damages and the territorial scope of a state's power to impose them. But at least in the field of automotive product liability, those limits have not prevented arbitrary imposition of punitive damages. The members of the Alliance and AIAM accordingly have a strong interest in the Court's consideration of *Ford Motor Co. v. Smith,* No. 02-1096, and

Ford Motor Co. v. Romo, No. 02-1097[2] (as well as *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002), in which a petition for a writ of certiorari is soon to be filed), as they provide an opportunity to resolve the constitutional issues concerning punitive damages in product liability cases.

SUMMARY OF ARGUMENT

The *Smith* and *Romo* petitions give the Court an opportunity to provide badly needed guidance to end what is now a rule of essentially random imposition of punitive damages, in randomly large amounts, against product manufacturers. The automotive industry has been building ever safer cars, but facing ever greater punishment. The verdicts are arbitrary: designs that meet federal safety standards promulgated by the National Highway Traffic Safety Administration (NHTSA) are deemed dangerous and punishable; designs exonerated by one jury are deemed grounds for punishment by another. And the amounts awarded are untethered to any rational basis – a design found to have caused death may trigger punishment of $3 million to over $1 billion. Such irrational results and random punishment do not, and by their nature cannot, accomplish the legitimate purposes of punitive damages, and indeed, occasion the arbitrary deprivation of property that the Constitution condemns. This Court's guidance is badly needed.

[2] Given the similarity of issues in *Smith* and *Romo*, the Alliance and AIAM are filing similar briefs supporting petitioner in each case.

ARGUMENT

The twin cases before the Court – *Smith* and *Romo* – are not aberrations. The automotive industry has been subjected to random imposition of punitive damages, in huge amounts, with respect to designs that meet industry standards, that exceed federal safety standards, that NHTSA itself has investigated and not found defective, and that have been found safe by other juries. A punitive damages system that allows such "arbitrary deprivation of property" and punishment by definition does not meet due process. *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 (1994). Punitive damages law is broken. These cases provide the Court with an opportunity to fix it.

The sole purposes of punitive damages are to punish past, and deter future, wrongdoing. *Cooper Indust., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 432 (2001); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 21-22 (1991). Both purposes depend on reasonable notice of what conduct will trigger punishment. A manufacturer cannot be deterred from one design choice and encouraged to adopt another unless it can foresee which choice will trigger, and which will avert, punishment. Indeed, it is simply unfair to punish a manufacturer for conduct that was, or reasonably appeared, lawful when and where it occurred. Yet, in a product design setting, where designs and legal tests for defect are based on engineering trade-offs and judgment calls, notice of what is and is not a proper design is, in the best of circumstances, elusive.

Punitive damages in product cases – especially the massive awards in cases like *Smith* and *Romo* – reflect the problem. As the Court cautioned in another automotive case, "Punitive damages pose an acute danger of arbitrary

deprivation of property" and juries may "use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg,* 512 U.S. at 432. Automobile manufacturers are large companies. Some are foreign manufacturers to boot. These companies' wealth, and distance from individual juries, put them at risk for unwarranted punishment, especially where plaintiffs are sympathetic and injuries are severe.

The Court in *BMW of North America v. Gore,* 517 U.S. 559 (1996), articulated minimum Due Process requirements designed to assure that punitive damages fairly served their purposes without arbitrary, unfair punishment. "Elementary notions of fairness," the Court held, entitle a defendant to "fair notice not only of the conduct that will subject [it] to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. The Court laid down three guideposts for measuring punitive damages under the Due Process Clause. 517 U.S. at 574-85.

The *Gore* standards, however, developed in a case involving economic loss, have not controlled runaway verdicts in personal injury product liability litigation. Juries continue to impose – and courts continue to affirm – unpredictable, even conflicting, punishments, often for good-faith conduct, apparently lawful at the time. The result is arbitrary punishment, without reasonable notice of what conduct will be punished, or how much, or how to avoid punishment in the future.[3]

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[3] It is no answer to say that manufacturers have notice they should avoid defective designs. The test for defect involves judgment calls

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The Alliance and AIAM file this brief to alert the Court to what is really happening to the automotive industry without meaningful punitive damages controls, so the Court can understand why the *Smith* and *Romo* cases represent both a real and pervasive problem in the lower courts, and an opportunity for this Court to correct that problem.

I. UNPREDICTABLE, CONFLICTING PUNITIVE DAMAGES AWARDS

As this Court observed in *Gore,* "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. In actual practice, however, the current constitutional standards permit irrational and even contradictory results, especially in product liability cases where manufacturers cannot avoid design tradeoffs. Such random punishment does not – and by definition cannot – accomplish any legitimate purpose.

For example, in *Smith,* the Kentucky Supreme Court reinstated a $15 million punitive damages award based on a transmission design susceptible to shifting from Park to Reverse. This misshift risk cannot be eliminated from an automatic transmission; as a matter of physics, there is a

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about safety, utility and cost that are subject to debate. A manufacturer choosing a design cannot predict whether a jury in some future case will deem that judgment call reasonable or punishable. In practice, juries do both.

midpoint between Park and Reverse. At least 15 juries had found Ford's transmission not defective at all and the federal safety agency, the National Highway Traffic Safety Agency (NHTSA), had specifically investigated and not found any defect. (*See Smith* Petition at 6-7) In addition, the Virginia Supreme Court had held punitive damages unavailable as a matter of law in a similar misshift claim against Ford, even as it affirmed compensatory liability. *Ford Motor Co. v. Bartholomew,* 297 S.E.2d 276, 683-84 (Va. 1982); *cf. General Motors Corp. v. Sanchez,* 997 S.W.2d 584, 595-98 (Tex. 1999) (affirming compensatory liability but holding punitive damages unavailable as a matter of law in misshift claim against General Motors). Thus, different juries and courts have variously found misshift susceptibility not to be a defect at all; defective but not punishable; and punishable.

And in *Romo,* the California Court of Appeal reinstated a $290 million punitive damages verdict for a roof design in use for a quarter-century, that had never been found defective in any case – and in fact, far from causing widespread harm, had never even been the subject of a lawsuit, much less a judgment. Indeed, the roof design was ahead of its time, far surpassing federal roof-strength regulations first adopted several years later – regulations that, by definition, "meet the need for motor vehicle safety." 49 U.S.C. § 30111(a).

The *Smith* and *Romo* cases do, and should, give pause about the need for additional guideposts to protect against arbitrary punishment. Due process should foreclose punishment when different engineers (and juries) can reach different conclusions on a design's merits. For by definition, where reasonable minds can believe a design is

safe, there is no basis for finding wantonness in its use, and no way to predict its adoption will be punished. Due process should foreclose punishment when a manufacturer complies with an on-point federal standard. For Congress has mandated that NHTSA adopt standards that are "practicable" and "meet the need" for motor vehicle safety. 49 U.S.C. § 30111(a). Compliance with an on-point safety standard, even if not a defense as a matter of law to liability, by definition negates the evil intent required for punitive damages and makes punishment inappropriate; indeed, a finding that a complying design reveals evil intent is an ad hoc indictment of NHTSA's own good faith – something no case should allow and no manufacturer should be charged with predicting. Without these kinds of constitutional safeguards, irrational and arbitrary punishment will be routine.

Indeed, *Smith* and *Romo* are not unique; they are the norm. Take the case of Nissan's experience with claims of "unintended acceleration" in its 300ZX car. "Unintended acceleration" is when a car accelerates when the driver does not intend it to accelerate. Most all cars have been the subject of such claims. The problem is most often pedal error: the driver hits the gas instead of the brake. Nissan had won at least three jury verdicts, two directed verdicts and a summary judgment in cases alleging a defect-caused unintended acceleration in Nissan's 300ZX car.[4] After

[4] *Ammel v. Nissan Motor Co., Ltd.*, San Diego County (Calif.) Superior Court No. 577345 (Feb. 20, 1991) (jury verdict of no design defect); *Silverman v. Swenson*, Orange County (Calif.) Superior Court No. 522924 (Nov. 5, 1991) (jury verdict of no design defect); *Rinck v. Nissan Motor Co.*, Hamilton County (Tenn.) Circuit Court No. N-33587 (July 30, 1990) (jury verdict for Nissan); *Robertson v. Nissan Motors*

(Continued on following page)

investigation, Nissan believed the reports were caused by pedal error. NHTSA also had investigated such claims in hundreds of 300ZX cars, found "no safety related defect," and also determined that incidents were likely caused by pedal error. Far from ignoring the problem, Nissan committed $30 million to retrofit the cars to protect against pedal error. Nonetheless, in *Nissan Motor Co., Ltd. v. Armstrong,* 32 S.W.3d 701, 710-11 (Tex. App. 2000), *pet. for review filed* (Tex. Feb. 21, 2001) (No. 01-0030), a Texas jury held that the same unintended acceleration incidents, which NHTSA and Nissan found to be caused by drivers' pedal errors, proved a throttle design defect. The jury then imposed punitive damages on the theory that Nissan was indifferent to safety because it agreed with NHTSA on the likely cause of the incidents and committed $30 million to addressing that cause, rather than changing a throttle part that neither thought was the cause. The Texas Court of Appeal affirmed a $2 million punitive damages award.

Clark v. Chrysler Corp., 310 F.3d 461 (6th Cir. 2002), is another example of punitive damages gone awry. There, a car's door latch separated in a collision, allowing the door to open, and plaintiff's decedent to be ejected from the vehicle. NHTSA had adopted a standard for door latch strength, a standard explicitly designed "to minimize the likelihood of occupants being thrown from the vehicle as a result of impact." 49 C.F.R. § 571.206 S1. Chrysler's latch was twice as strong as NHTSA's standard required.

Corp. in U.S.A., Los Angeles County (Calif.) Superior Court No. C666570 (Aug. 13, 1991) (directed verdict); *Gallo v. Nissan Motor Corp.,* Los Angeles County (Calif.) Superior Court No. SEC63128 (Apr. 19, 1990) (directed verdict); *Bonanno v. Jordan,* United States District Court for the District of Vermont No. 2:92-CV-333 (Aug. 30, 1991) (summary judgment).

Nonetheless, a jury imposed punitive damages and the Sixth Circuit (over dissent) affirmed them, on the ground that NHTSA's strength requirements were not adequate for real accidents. 310 F.3d at 469, 481; *see* 310 F.3d at 483 (Nelson, J., dissenting). Thus, just as manufacturers cannot count on avoiding punitive damages by complying with their own engineering judgments, even when repeatedly validated by juries, neither can they count on NHTSA's independent judgment.

The law, amici respectfully submit, thus affords no real notice of the conduct that will subject a manufacturer to punitive damages if it allows juries to both exonerate and punish a manufacturer for adopting the same design – or to punish as maliciously dangerous designs far exceeding expert standards that already "meet the need for motor vehicle safety." 49 U.S.C. § 30111(a).

Indeed, carmakers are sometimes subject to punitive damages no matter what choice they make. For example, in *Romo*, the punitive damages award was affirmed in part because Ford changed the challenged design. Ford reinforced the roof in a later model year Bronco, which, the California Court of Appeal reasoned, proved Ford acted reprehensibly in using the prior roof in 1978. *Romo* Pet. App. 35a. The message: No good deed goes unpunished. *See also General Motors Corp. v. Johnston,* 592 So.2d 1054, 1060 (Ala. 1992) (affirming, as reduced, punitive damages based on evidence that GM "attempt[ed] to correct the problem" while failing to notify buyers).[5]

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[5] Indeed, this reasoning points up the need for territorial limits on punitive damages. Federal Rule of Evidence 407, and many like state

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Yet other cases hold punitive damages justified because the manufacturer did ***not*** change the design. *E.g., American Motors Co. v. Ellis,* 403 So.2d 459, 467 (Fla. App. 1981) (punitive damages justified because, although aware of danger, "AMC chose not to implement the recommendation of its engineers to relocate the fuel tank"); *Wangen v. Ford Motor Co.,* 294 N.W.2d 437, 462 (Wis. 1980) (punitive damages appropriate because Ford did not change design of gas tank and surrounding components despite known fire hazard); *see Armstrong,* 32 S.W.3d at 710-11 (affirming punitive damages because Nissan allegedly knew part could fail and cause unintended acceleration, but did not issue mandatory retrofit or special warning).

These cases send exactly the wrong message. They tell manufacturers that even designs found safe by juries or that comply with on-point NHTSA standards that by Congressional mandate must "meet the need for motor vehicle safety" will be punished; that automakers cannot escape punitive damages whether they keep designs or change them; that no matter what choices they make and how often they are vindicated by juries they will be punished eventually in some case; and that punitive damages are accordingly simply a random risk and an inescapable cost of doing business.

That turns the purposes of punitive damages upside down. The law justifies punitive damages on the basis that they are meant to shape conduct. They cannot shape

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rules, forbid consideration of subsequent design changes on liability. It is perverse indeed if one state, like California, can impose nationwide punishment based on the very design innovation that federal (and other states') law seeks to encourage and so refuses to punish.

conduct if they are imposed whatever the conduct and no conduct can predictably protect against them. And punishing manufacturers for products they reasonably believed reasonably safe, *i.e.* lawful – which belief was supported by NHTSA standards and investigation reports, industry standards, and numerous jury verdicts – is fundamentally unfair and violates the notice requirement of the Due Process Clause. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher,* 238 U.S. 482, 490 (1915) ($6,300 civil penalty violated "fundamental principles of justice," even if the defendant "should have known that the Supreme Court of the State in the exercise of its judicial power might hold [its conduct] unreasonable," where "the prevailing view elsewhere was otherwise").

In short, *Smith* and *Romo* are not unique. They reveal a devastating lack of controls on punitive damages in the lower courts, which prevents punitive damages from serving their legitimate purposes – fair retribution and deterrence. The result is the very "arbitrary deprivation of property" that *Oberg* condemns as a violation of due process. The Court should grant review to set specific guidelines, and limits on the availability of punitive damages, that prevent such random punishment.

II. ENORMOUS AWARDS THAT EVISCERATE THE *GORE* FACTORS.

Even where some punitive damages are appropriate, the Due Process Clause "imposes substantive limits" on the amount of punitive damages. *Cooper,* 532 U.S. at 433-34; *Gore,* 517 U.S. at 585-86. In deciding whether the line has been crossed, courts must focus on the defendant's degree of reprehensibility or culpability, the relationship

between the penalty and the harm to the victim caused by the defendant, and the sanctions in other cases for comparable misconduct. *Gore,* 517 U.S. at 575-85; *see Cooper,* 532 U.S. at 440.

Ford's petitions in *Smith* and *Romo* demonstrate that the *Gore* guideposts provide no real or consistent controls on the amount of damages in product liability cases. Perhaps because the *Gore* factors were developed in a case that did not involve personal injuries or engineering judgments, the lower courts in automotive product liability struggle with them. Some cases apply the guideposts, some ignore them, and some discard them. (*Smith* Pet. 21-30; *Romo* Pet. 9-23) The arbitrary award of crushing amounts, on top of random imposition of punitive liability, makes the absence of controls doubly offend due process.

Again, *Smith* and *Romo* are not alone. A single case demonstrates that there is no practical limit on punitive damages in product liability cases. In *Anderson v. General Motors Corp.,* Los Angeles County (Calif.) Superior Court No. BC 116926, *notice of appeal filed*, No. B135147 (Cal. Ct. App. Sept. 9, 1999), people injured in a post-collision fire sued GM, claiming that placement of the gasoline tank behind the rear axle created an excessive danger of fuel-fed fire in the event of a crash. The vehicle met all relevant requirements for rear-end crashworthiness, and the fuel tank was in the same location as 98% of the other vehicles marketed. Nevertheless, the jury not only found the tank defective, it awarded $4,800,000,000 ($4.8 billion) in punitive damages. The trial court, purporting to apply *Gore*, reduced it to a mere $1.09 billion.

That judgment, even as reduced, was 218 times greater than any California award in any published case (before *Romo*) and 19 times greater than any punitive

damage award ever affirmed in any federal court in any reported case. One year's post-judgment interest alone would be 22 times the largest award ever affirmed in a reported California case (again before *Romo*) and almost twice the largest ever affirmed in a reported federal case. No one – literally, no one – could have foreseen in the 1970s, when the tank was designed, that a manufacturer would be subjected to over a billion dollars in punishment.

The results in real cases prove there are no practical controls on the amount of punitive damages in product liability cases. Punitive damages awards are random; in just the last few years, punitive damages in automotive product liability cases against the big three American auto manufacturers (GM, Ford and Chrysler) have included $3 million (*Clark*), $15 million (*Smith*), $290 million (*Romo*), and $1.09 billion (*Anderson*). The ratio between the high and low awards – over 300 to 1 – for similar claims (alleged defects that cause severe injuries or death) and similar sized companies alone confirms that existing law provides no controls.

Massive punitive awards like *Romo*'s $290 million award, for designs that complied with federal standards and had never before caused injury, demonstrate that punitive damages have spiraled out of control in automotive litigation. Judges' failure to rein them in demonstrates that current constitutional standards do not provide sufficient lower court guidance. Indeed, the *Smith* majority opinion unintentionally proves the problem. The Kentucky Supreme Court there observed that "the reality" of "national experience" facing an automaker is that a $15 million punitive damages award is reasonably foreseeable. (*Smith* App. 19a) This circular "reality," in which each enormous award justifies the next, is the problem, not the answer.

The *Smith* and *Romo* cases give the Court an opportunity to set substantive due process limits on imposition of punitive damages, define jury instructions that will help assure adherence to those substantive limits, explain the territorial reach of jury awards, and clarify the reviewing courts' duty to control jury excesses. The Court should grant certiorari to provide that specific guidance on the constitutional limitations on punitive damages.

CONCLUSION

For these reasons, the Alliance and AIAM respectfully urge the Court to grant the Petitions.

DATED: April 7, 2003

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Supreme Court, U.S.
FILED
APR 7 2003
CLERK

(5)

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae are organizations that together represent business companies and associations of businesses engaged in all forms of manufacturing and other commerce throughout the United States and around the world. In this era of expansive tort litigation against corporations and even entire industries, *amici*'s members have been forced to defend against products liability lawsuits seeking millions and sometimes billions of dollars in jury-imposed punitive damages. It has been *amici*'s experience that, in such cases, the lower courts routinely have been misapplying and, indeed, effectively nullifying the three excessiveness guideposts identified by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996). *Amici* are uniformly of the view that the lower courts need guidance from this Court as to the proper application of the *BMW* guideposts in the products liability context and have joined together in both this case and *Ford Motor Co.* v. *Romo*, No. 02-1097, to urge the Court to grant plenary review in one or both of these cases to provide that needed guidance.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last dozen years, this Court has addressed (or will address) excessiveness challenges to punitive awards in five cases — *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996); *Cooper Indus. Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441-

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that preparation and submission of this brief was funded entirely by *amicus curiae* the Product Liability Advisory Council, Inc. ("PLAC"). PLAC is a non-profit association with 131 corporate members who seek to contribute to the improvement and reform of the law governing the liability of product manufacturers. A complete list of PLAC's members is attached hereto as Appendix A.

443 (2001); *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, No. 01-1289 (argued Dec. 11, 2002).

Significantly, none of these cases involved a products liability claim.[2] As a consequence, lower courts have found a lack of clear guidance as to the proper application of the *BMW* guideposts in the products liability context. Left to their own devices, many courts have, like the court below, misapplied or, like the California Court of Appeal in *Romo*, refused outright to apply the guideposts, essentially on the ground that death (or serious personal injury) is different. Ironically, there is no context in which it is ***more*** important to ensure that punitive damages are not arbitrary and do not exceed society's interest in rational deterrence than this one. Products are the lifeblood of the American economy. Multimillion dollar punitive awards rendered against manufacturers who have made good-faith design decisions and whose products have been investigated and found non-defective by expert federal safety agencies deprive product manufacturers of property without fair notice but have the inevitable effect of chilling innovation, encouraging excessive precautions, and increasing the price of products beyond the means of many potential purchasers.

Amici believe, therefore, that it is vitally important for the Court to grant plenary review in a products liability case to supply needed guidance as to the proper excessiveness inquiry in this context. We further submit that this case and *Ford* v. *Romo* are ideal for providing this needed guidance. Together, these two cases provide the Court with the opportunity to explain (i) the criteria that should be considered in determining when a product manufacturer's decision to employ a design later found by a jury to be defective should be treated as sufficiently reprehensible to warrant "a punitive sanction that is tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at

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[2] The Court has used a product liability case to address the ***procedural*** requirements for administration of punitive damages. See *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

585); (ii) the role of the ratio guidepost when compensatory damages are high, the probability of escaping liability for tortious conduct is low, and the compensatory damages exceed the defendant's "gain" from choosing the design at issue over the supposedly safer one proposed by the plaintiff; (iii) the proper application of the comparative fines guidepost when the plaintiff seeks to analogize the defendant's tort to criminal conduct;[3] and (iv) the significance of the fact that, when the conduct involves the design of a mass-produced product, other juries may either vindicate the defendant or seek to punish it for the same design decision. As we discuss below, each of these four issues recurs in products liability litigation and is well illustrated in one or both of the two Ford cases that are now before the Court.

ARGUMENT

Only seven years ago, this Court observed that a $2 million punitive damages award is "tantamount to a severe criminal penalty" and suggested that punishment of this magnitude must be reserved for "egregious" misconduct. *BMW*, 517 U.S. at 585. While many courts have taken that admonition to heart in cases that have not involved personal injury by ordering remittiturs of large punitive awards to mere fractions of themselves, we are aware of ***no*** post-*BMW* products liability case in which a reviewing court has ordered a remittitur of a

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[3] Although the Kentucky Supreme Court (unlike the California Court of Appeal in *Romo*) did not analogize Ford's conduct to a crime, it misapplied the third guidepost in another way. As pointed out in Ford's petition (at 29-30), the Kentucky Supreme Court's effort to justify a $15 million punishment by comparing it to punitive awards that post-dated the conduct is utterly inconsistent with the fair notice concern that underpins the *BMW* guideposts. We fully endorse Ford's suggestion that review is warranted to make clear that, to the extent the third guidepost invites consideration of other approved punitive awards, it requires that those awards pre-date the defendant's tort and involve "comparable" conduct.

punitive award to less than seven figures.[4] In other words, in every post-*BMW* products liability case involving a sustainable finding of punitive liability, the reviewing court concluded that the defendant warranted a punishment "tantamount to a severe criminal penalty." These penalties have ranged from a $1.09 ***billion*** dollar punitive award (reduced from $4.8 billion) in a case alleging that General Motors defectively designed its gas tanks by placing them behind instead of above the rear axle to the $290 million penalty in *Romo* to a $79.5 million penalty in an individual smoker's tobacco case to the $15 million punishment in this case to a $1 million penalty in the case of a fish bowl that shattered while being carried. It defies common sense, however, to suggest that every products liability case in which there is sufficient evidence to support ***some*** amount of punitive damages is one in which a penalty of ***millions*** or ***hundreds of millions*** of dollars is warranted. See *BMW*, 517 U.S. at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award."). As this case and *Romo* both well illustrate, the lower courts are routinely misapplying the *BMW* guideposts to uphold seven, eight, and nine-digit punitive awards precisely ***because*** the cases involve products liability. The two cases are thus excellent vehicles for providing the lower courts with much- needed guidance as to the proper excessiveness analysis in the products liability context.

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[4] A list of post-*BMW* cases in which courts have reduced multimillion dollar punitive awards to $500,000 or less is included as Appendix B. Notably, not one of these cases arose in the products liability context.

A. The Lower Courts Are Systematically Misapplying The First Guidepost By Treating The Marketing Of Products Entailing Risk Of Personal Injury As Reprehensible *Per Se.*

"Perhaps the most important indicium of the reasonableness of a punitive damages award" (*BMW*, 517 U.S. at 575), the degree of reprehensibility of the defendant's conduct is also the guidepost most susceptible to misapplication in products liability actions. The linchpin of this guidepost is "the accepted view that some wrongs are more blameworthy than others." *Ibid.* This guidepost thus requires reviewing courts to locate the conduct on a spectrum of reprehensibility, with a "high degree of culpability" necessary for "a substantial punitive damages award" (*id.* at 580). Reviewing courts have gone astray by treating products liability as a category that uniformly resides at the high end of the reprehensibility spectrum — without any serious effort at intra-category comparison — merely because such cases tend to involve serious personal injury.

Unlike many other classes of torts, products liability claims by definition involve physical injuries or death. Looking through the virtually inescapable lens of hindsight bias at a seriously injured plaintiff on the one hand and a large corporate defendant that balanced safety against other benefits such as product usefulness, attractiveness, and cost to consumers on the other, juries are easily provoked to a state of outrage that leads them to award astounding sums in punitive damages irrespective of the true culpability of the defendant's conduct or the need for punishment and deterrence. As Judge Easterbrook has explained in a case involving the design of the emergency stop button on an escalator:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. * * *

> Come the lawsuit, however, the passenger injured by a stop presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured if buttons were harder to find and use are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

Carroll v. *Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (corporations' "superior ex ante risk judgments may be outweighed by the ex post reality of the accident victim"); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 552 (2000) (mock juror study revealed that even proper corporate balancing of risks against costs leads to inflated punitive damages awards). Such hindsight bias is compounded substantially when the plaintiff is able to show that the defendant employed cost-benefit analysis in selecting one particular design rather than another — that the defendant "traded lives for dollars." See David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 11 (1982)).[5]

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[5] Ironically, the corporate cost-benefit analysis that drives juries to award massive punitive damages is the very same risk-utility test that jurors are instructed to apply in making the underlying liability determination. See *Soule* v. *General Motors Corp.*, 882 P.2d 298, 311 (Cal. 1994) (jury must evaluate allegedly defective automobile design by balancing and weighing "such competing design considerations as risk, benefit, feasibility, and cost").

As this Court has recognized, appellate review can play a vital role in filtering out such bias and helping to ensure that punitive awards comport with the requirements of due process. See *Haslip*, 499 U.S. at 21 ("appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"). But when appellate courts evaluating reprehensibility make precisely the same errors that infected the underlying jury verdicts, such review does nothing to ameliorate the constitutional violations.

The present case is illustrative. Nominally applying the reprehensibility guidepost, the court below found the degree of reprehensibility of Ford's conduct to be "substantial." Pet. App. 17a. It could do so, however, only by giving no weight to the undisputed facts that (i) NHTSA had repeatedly investigated Ford's transmission without ever finding it to be defective; (ii) many other manufacturers had utilized the same design; and (iii) numerous other juries had found the design not be defective. *Ibid.*; Pet. for Cert. 6-7. Instead, it relied exclusively on evidence purportedly showing that "for at least seven years after Ford knew of the dangerous propensities of the C-6 transmission, it continued producing and installing it in vehicles." Pet. App. 17a.

In other words, the court below held that Ford's conduct was at the high end of the reprehensibility spectrum merely because Ford knowingly (*i.e.*, intentionally) mass produced and sold a product that, although useful and highly desirable to consumers, also entailed some risk of harm. In so doing, the court turned on its head the first principle of products liability law — that because most products entail some risk of harm, the task of a responsible manufacturer is to strike a reasonable balance between safety and a host of other considerations, including "marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive*

Damages in Products Liability Litigation, 74 KY. L.J. 1, 88-89 (1985). Thus, the same activities that are the hallmark of good corporate behavior and should generally insulate the defendant from all liability (see note 5, *supra*) — or, at most, should be a basis for compensatory damages only — were treated as an aggravating factor supporting a jaw-dropping nine-figure punitive exaction.[6]

By conflating intentional ***conduct*** — *i.e.*, cost-benefit analysis in design decisions and the marketing of products — with intentional ***harm*** — *i.e.*, "affirmative acts of misconduct" (*BMW*, 517 U.S. at 576) — the court below deprived the reprehensibility guidepost of any constraining force in the products liability context. As one commentator has explained, design defect cases inevitably involve "'conscious design choice[s]' * * * implicat[ing] a manufacturer's decisionmaking process concerning risk-utility"; "[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with 'intent' built in." Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994).[7] The consequence of equating complex design

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[6] Cf. Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 ALA. LAW. 46, 49 (1997) ("Regardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff's lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money. As a result, an argument for reprehensibility can be supported in virtually every case.").

[7] See also, *e.g.*, Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 566 ("undertaking [cost-benefit] analysis and making a conscious [and correct] decision to forego the improvement will subject a company to the charge that it 'deliberately intended to injure the plaintiff'"); Owen, *supra*, 49 U. CHI. L. REV. at 26 ("a manufacturer's choices involving necessary safety trade-offs and

decisions for inherently dangerous products like automobiles with intentionally harming the injured plaintiff is that "every actor could be held strictly liable [under that standard] for punitive, in addition to compensatory, damages for any consequence to any person that was contemplated in advance of any course of action." Owen, *supra*, 49 U. CHI. L. REV. at 22; see also *id.* at 23 ("The decision to market a product in a certain condition with certain risks may have been a good one because the expected benefits were great, and the product may not have been legally defective at all, yet under this standard the manufacturer remains subject to punishment for 'disregarding' the lesser risks by proceeding to sell the product with any danger whatsoever").

When that distorted view of intentionality is imported into the reprehensibility analysis, any attempt by a manufacturer to "think about risks in a systematic manner and to undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" (Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 550) will be seen as the egregious misconduct justifying severe punishment under *BMW*. And the resulting sky's-the-limit punitive awards will deter the socially responsible commercial behavior that products liability law was designed to foster.

Unfortunately, the Kentucky Supreme Court's simple-minded equation of knowledge that a product can cause death or physical injury with high reprehensibility — while sloughing off such objective indicia of low reprehensibility as the failure of the expert safety agency to find the product defective after thorough investigation, the consistency of the design with industry standards and practice, the existence of room for disagreement among experts, and the existence of prior

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statistically inevitable risks always can be viewed in a sense as intentional wrongs to consumers hurt by such products, as safe on balance as such products may actually be") (footnote omitted).

exonerations by other juries — is not unique.[8] To the contrary, we are unaware of a single published post-*BMW* opinion concluding that a manufacturer's conduct was not sufficiently egregious to warrant the penalty imposed. This Court's guidance as to the proper application of the reprehensibility guidepost in the products liability context is therefore urgently needed.

B. The Lower Courts Are Systematically Misapplying The Second Guidepost By Viewing High Compensatory Damages As Automatically Justifying High Ratios And Large Punitive Awards.

In *BMW*, this Court quite properly rejected a "categorical approach" to the ratio guidepost, reminding bench and bar that it is impossible to "draw a mathematical bright line between the

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[8] See, *e.g.*, *Clark* v. *Chrysler Corp.*, 310 F.3d 461, 482 (6th Cir. 2002) ("Chrysler's conduct resulted in the loss of life, which clearly evidences a greater disregard for the rights and safety of others than failure to reveal that a car has been repainted."); *Romo* v. *Ford Motor Co.*, 122 Cal. Rptr. 2d 139, 165 (Cal. Ct. App. 2002) (finding Ford's design decision to be "grossly reprehensible" notwithstanding fact that the design complied with federal safety standards and was consistent with industry standard and customs), pet. for cert. pending, No. 02-1097; *Cooper Tire & Rubber Co.* v. *Tuckier*, 826 So. 2d 679, 690 (Miss.) (holding that, although only 1 out of 66,000 tires was defective, "[w]hen this one defective tire results in a person's death, there is sufficient evidence to establish" reprehensibility), cert. denied, 123 S. Ct. 97 (2002); *Waddill* v. *Anchor Hocking, Inc.*, 27 P.3d 1092, 1098 (Or. Ct. App. 2001) ("conscious indifference to the possibility that the fishbowl could injure someone during ordinary use and the failure to warn of that possibility * * * implies a wilful disregard of a known risk to consumer safety"), pet. for cert. pending, No. 02-370; *North Am. Refractory Co.* v. *Easter*, 988 S.W.2d 904, 919 (Tex. Ct. App. 1999) (reprehensibility guidepost satisfied even though defendant "believed that its products were safe," because its product "endangered the health and safety of at least three individuals").

constitutionally acceptable and the constitutionally unacceptable that would fit every case." 517 U.S. at 582-583. Unfortunately, many lower courts have construed this pronouncement to be an invitation to disregard the ratio guidepost rather than to build an analytical framework through case-by-case development. Nowhere is this problem more evident than in the products liability context. Not only do some courts employ a mathematical bright line rule that single-digit ratios are per se indicative of a constitutionally permissible punishment — no matter how large the compensatory damages may be — but others have simply cast aside the reasonable relationship requirement on the ground that the injuries were severe.[9]

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[9] See, *e.g.*, *Burton* v. *R.J. Reynolds Tobacco Co.*, 205 F. Supp. 2d 1253, 1263 (D. Kan. 2002) (allowing $15 million in punitive damages, or 76.4 times compensatory damages, on theory that personal injuries warrant greater ratios than economic injuries); *Sand Hill Energy, Inc.* v. *Ford Motor Co.*,83 S.W.3d 483, 494 (Ky. 2002) (affirming punitive damages of 5 times multimillion dollar compensatory award because "[t]he harm to Tommy Smith was death. The harm to his estate was the total destruction of his power to labor and earn money. It would be impossible to overstate the degree of harm."); *Williams* v. *Philip Morris Inc.*, 48 P.3d 824, 840-842 (Or. Ct. App. 2002) (affirming punitive damages award of $79.5 million, or 97 times compensatory damages, because "the jury could have found that defendant's actions resulted in Williams' death; based on that finding, it could have believed, in light of defendant's profits, that only a large award would be proportionate to the harm that defendant caused"); *Waddill*, 27 P.3d at 1099 ("It is common knowledge that broken glass is dangerous and can cause serious injuries. We cannot say that it is excessively disproportionate to punish a company that makes glass products that can cause the degree of damage that plaintiff suffered by an award that is no more than ten times the actual injury that its actions caused."); *Ford Motor Co.* v. *Ammerman*, 705 N.E.2d 539, 562 (Ind. Ct. App. 1999) (affirming ratio of 2.73:1 on $4 million compensatory award and 18.25:1 on $400,000 compensatory award because, "[u]nlike *Gore* the injuries suffered by the plaintiffs in this case are physical, permanent, and

The present case exemplifies the former problem. Though not expressly jettisoning the ratio guidepost entirely, the Kentucky Supreme Court disregarded this Court's statement in *BMW* that there is no single ratio that fits all cases, apparently believing that it had discharged its duty under *BMW* by reducing the punitive award from a ratio of approximately 7:1 to 5:1. See Pet. App. 20a-21a. It accordingly gave no consideration to whether a 5:1 ratio that yields a $15 million punitive exaction is indicative of excessiveness in view of such factors as the absence of a financial motive for designing the transmission as Ford did, the fact that Ford's design was identical to those of most other automakers, the fact that NHTSA repeatedly has found the design not to be defective, and the fact that numerous juries have exonerated Ford of even compensatory liability for the design. See Pet. for Cert. at 6-7.

Romo exemplifies the latter problem. There, the court of appeal expressly reasoned that "the importance of the [ratio] factor is somewhat reduced" and affirmed the $290 million punitive exaction notwithstanding the 63:1 ratio on the ground that the multimillion dollar "wrongful death compensatory damages do not fully reflect the harm to the victims." 122 Cal. Rptr. 2d at 166. In other words, the court evaded the ratio guidepost by beginning with an already large compensatory award and then positing that, because people died, the compensatory damages necessarily understate the actual harm to the plaintiffs — this despite the fact that California imposes no cap on either economic or non-economic damages.

This Court already has indicated that high ratios like the one in *BMW* weigh in favor of a finding of excessiveness when damages are not small and the conduct, albeit an intentional tort, is not egregious. It also has identified several circumstances in which a high ratio of punitive to compensatory damages may be justified: when "a particularly egregious act has resulted in only a small amount of economic

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severe").

damages"; when "the injury is hard to detect," suggesting that the defendant could have expected to escape liability for its conduct and be underdeterred as a result; and when "the monetary value of noneconomic harm might have been difficult to determine," prompting concern that the defendant has not been made to internalize the full social costs of its conduct and thus has been underdeterred. *BMW*, 517 U.S. at 582. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877-900 (1998) (explicating economic theory of deterrence). The Court has not, however, had the opportunity to fill in other boxes in the matrix. Most notably, it has not addressed the situation presented here and in other products liability cases in which the harm is not intentional, the compensatory damages are themselves in the seven figures and far exceed any rational (and fairly apportioned) measure of the defendant's "ill-gotten" gain from its conduct, and there is no possibility that the harm would go undetected.

The present case and *Ford* v. *Romo* together present this Court with an ideal opportunity to provide further guidance regarding proper application of the ratio guidepost in this recurring context. Although the ratios in the two cases are dramatically different — 5:1 and 63:1 — both cases afford the Court the opportunity to expound on the circumstances in which even a modest ratio may be indicative of an excessive punishment. In both cases, the defendant concededly did not act with malicious intent; in both cases, the source of the harm was not difficult to detect, obviating any concern that the defendant might escape liability for tortious conduct; in both cases, the compensatory damages are largely noneconomic and run into the millions of dollars, making it unlikely that the award understated the injury; and in both cases, the compensatory damages far outstrip the amount the defendant could be said to have "gained" by virtue of choosing the design at issue over the one proffered by the plaintiffs' expert.

In this case, for example, it is a matter of common sense

that Ford saved ***nothing*** by choosing to locate the point of hydraulic release where it did. In *Romo*, the evidence was that the cost of including a roll bar in 1978 and 1979 Broncos would have been $10 to $12 per vehicle. When multiplied by the total number of Broncos sold without a roll bar, the amount that Ford can be said to have saved by choosing the design that it did rather than the alternative design proposed by plaintiffs' expert is in the range of $1,485,000 to $1,782,000 — a fraction of the $6.2 million in compensatory damages that plaintiffs received, even without any additional punitive award.[10]

It is a matter of common sense and wide judicial and scholarly recognition that, in such circumstances, the compensatory damages ordinarily suffice to achieve appropriate deterrence.[11] It follows that even a 1:1 ratio may therefore

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[10] Although for purposes of illustrating our point, we have calculated the "gain" by reference to the total number of 1978 and 1979 Broncos sold nationwide, we do not mean to suggest that it would be permissible for a jury in an individual case, applying the law of a single state, to seek to remove the entire gain from the nationwide sale of a product. Not only would that violate the prohibition against extraterritorial punishment articulated in *BMW;* it also would fail to account for the exoneration and excessive aggregate punishment problems discussed in Section C, *infra*.

[11] See, *e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory") (emphasis omitted); *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Maiorino* v. *Schering-Plough Corp.*, 695 A.2d 353, 370 (N.J. Super. Ct. App. Div. 1997) (concluding that "the large compensatory damage award to Maiorino of $435,000 by itself provided significant deterrence even to an employer as large as Schering" and holding therefore that "[a]n $8,000,000 punitive damage award was not necessary to punish Schering or to deter it and other employers from engaging in the type of conduct found to be discriminatory by the

reflect that the punitive award is excessive in relation to the state's interest in deterrence. Self-evident though these concepts may seem, however, not a single reviewing court confronted with a punitive award in the products liability context has even contemplated the possibility that the factors present in such a case may mandate that a lower ratio be regarded as the dividing line between a permissible and an unconstitutional punishment. Review is warranted to provide needed guidance with respect to this guidepost.

C. The Lower Courts Need Guidance Regarding The Proper Application Of The *BMW* Guideposts When The Plaintiff Has Encouraged The Jury To Punish The Defendant For The Effects Of Its Design Decision On Individuals Who Are Not Before The Court.

Another feature of products liability cases that renders it essential for this Court to give plenary consideration to such a case is the fact that hundreds of thousands if not millions of other people will have used or come into contact with the product for which the plaintiff is seeking to impose punishment. Indeed, the recitation of the number of other units on the market

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jury"); Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2082 (1998) ("Compensatory damages work well for deterrence if and only if it is easy to identify the injurer, bring suit, and collect full damages. Under these conditions, the wrongdoer faces liability for the full social costs of the wrong. Thus there is no need for additional damages if the probability of detection and successful suit for compensation is 100%."); George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 La. L. Rev. 825, 831 (1996) ("[T]he strongest theory in the modern tort academy is that full compensatory damages generate exactly the optimal level of deterrence of accidents — not too little and not too much. For purposes of deterrence or accident prevention, there is no need for punitive damages of any dimension, not to mention unlimited punitive damages, given the availability of full compensatory damages.") (footnote omitted).

or other people injured by the product is a routine feature of closing arguments in such cases, as both the present case and *Ford* v. *Romo* well illustrate. See Pet. for Cert. at 5, 15-16; Pet. for Cert. at 3-4, 25 n.12, *Ford Motor Co.* v. *Romo*, No. 02-1097. But, with the encouragement of plaintiffs' counsel, juries and reviewing courts consistently act as if the case before them is the only one in which the defendant will be or has been sued, while paradoxically assuming that the product is injuring or is likely to injure multiple people, for which fact the defendant should be severely punished.

This kind of approach presents twin problems of constitutional magnitude. On the one hand, if a verdict that is not limited to punishing for the injury caused to the particular plaintiff is aberrational — either because the product has not in fact injured anyone else or because the defendant has been vindicated in the preponderance of other cases alleging the same defect — it necessarily will overpunish the defendant in violation of due process. In addition, to the extent it overrides the determinations of juries in other states, such a verdict violates the deeply embedded constitutional principle that states are co-equal sovereigns. *BMW*, 517 U.S. at 571-573; see also *White* v. *Ford Motor Co.*, 312 F.3d 998, 1013-1020 (9th Cir. 2002). On the other hand, if other juries have in the past or could in the future impose punitive damages against the defendant for the same design, allowing the punishment to be predicated on or sustained on the basis of statistics about the number of units sold or the number of people injured is a recipe for an excessive aggregate punishment that violates the defendant's due process rights.[12]

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[12] For a more detailed treatment of these and related problems associated with the propensity of courts to allow punishment to be based on the fact that the defendant's conduct may have affected other individuals who are not before the court, see Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner, *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, No. 01-1289 (argued Dec. 11, 2002). For

Once again, the present case and *Ford* v. *Romo* are perfect illustrations of these dual problems.[13] In the present case, the record reflects that numerous other juries had vindicated Ford in cases in which plaintiffs had claimed a defect in the design of its transmission. See Pet. for Cert. at 7. In addition, NHTSA, the expert federal agency, has repeatedly declined to find the very defect upon which respondent's judgment rests. *Id.* at 6-7, 23 n.9. In such circumstances, it is the height of unfairness to allow a litigant in an individual case to deprive Ford of its vindications by prevailing upon the jury to punish it on behalf of all 200 people who plaintiff alleged were killed as a result of Ford's design choice.

In *Romo*, it is undisputed that no other court or jury — in 25

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a recent scholarly treatment of this subject, see Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (arguing that there is no historical basis for — and the Constitution forbids — allowing juries to impose punitive damages for injuries to individuals other than the plaintiff).

[13] There are many other examples of cases in which courts demonstrated no concern about the aberrational verdict and excessive aggregate punishment problems. See, *e.g.*, *Williams*, 48 P.3d at 839, 841 (reinstating $79.5 million punitive award in tobacco case in part because it was "reasonably inferable from the evidence that defendant's products * * * caused a significant number of deaths each year in Oregon during the pertinent time period," while giving no weight to fact that other juries in both Oregon and elsewhere had been and would continue to be asked to punish defendant for the same conduct); *Ammerman*, 705 N.E.2d at 560-564 (upholding $13.8 million punitive award derived from amount it would have cost defendant to retool its factories in order to remedy the defect, notwithstanding fact that other juries had exonerated defendant); *Owens-Corning Fiberglas Corp.* v. *Ballard*, 739 So. 2d 603, 607 (Fla. Dist. Ct. App. 1998) (giving no weight to fact that defendant had 7,000 pending claims against it, in course of upholding $31 million punitive award), approved, 749 So. 2d 483 (Fla. 1999).

years — has ever found the design defect alleged here. See Pet. for Cert. at 4 n.2, *Ford Motor Co.* v. *Romo*, No. 02-1097. Yet plaintiffs sought and received a punishment that removed the total profits from the sale of all 1978 and 1979 Broncos ***three times over***. In upholding the $290 million punitive exaction, the court of appeal took no account of the fact that the verdict might have been an aberration; nor did it consider the possibility that, if anyone else ever were to be injured as a result of the roof design, that person might be entitled to his or her own punitive damages award, presumably again calculated with reference to the number of vehicles marketed with this design.

The consequence of allowing any one jury that power is to ensure that, sooner or later, every manufacturer of any product that is involved in a non-negligible number of injuries will be subjected to at least one and maybe several enormous punitive exactions — even if, as in this case, the vast majority of juries have concluded not only that the defendant did not act with an egregious mental state but that the product was not defective at all or, as in *Romo*, it appears that no other person has ever alleged the defect found by the jury. In other words, a run-away jury in a single case could arrogate to itself the power to make a once-and-for-all determination that a product should never have been placed on the market — thus wiping out all of the other jury verdicts and regulatory findings exonerating the defendant. Review is warranted to provide the lower courts with needed guidance regarding this important, recurring issue in products liability cases.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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APRIL 2003

APPENDIX

Appendix A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Allegiance Healthcare Corporation
Altec Industries
Altria Group, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Ansell Healthcare, Inc.
Appleton Papers, Inc.
Astec Industries
Aventis Pharmaceuticals
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP Amoco Corporation
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Meyers Squibb Company
Brown and Williamson Tobacco
Brown-Forman Corporation
Caterpillar Inc.
CCA Industries, Inc.
Centerpulse USA Inc.
Chevron Corporation

Compaq
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Delphi Corporation
Dorel Juvenile Group, Inc.
E & J Gallo Winery
E.I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
ExxonMobil Corporation
FMC Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
GlaxoSmithKline
GLOCK, Inc.
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.

Joy Global, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors North America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Sears, Roebuck and Co.
Shell Oil Company
Siemens Corporation
Smith & Nephew, Inc.
Snap-on Incorporated

Sofamor Danek, Medtronic Inc.
Solutia Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Textron Inc.
The Dow Chemical Company
The Goodyear Tire & Rubber Company
The Heil Company
The Procter & Gamble Company
The Sherwin-Williams Company
Thomas Built Buses, Inc.
Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW, Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Whirlpool Corporation
Wilbur-Ellis Company
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.

(This list is current as of March 24, 2003)

Appendix B

Punitive Awards in Excess of $1 Million Reduced to $500,000 or Less After *BMW*

Leatherman Tool Group, Inc. v. *Cooper Indus., Inc.*, 285 F.3d 1146 (9th Cir. 2002) (reducing $4.5 million punitive award to $500,000 in unfair competition case); *Morse* v. *Southern Union Co.*, 174 F.3d 917 (8th Cir. 1999) (affirming remittitur of $6,250,000 million punitive award to $400,000 in age discrimination case); *EEOC* v. *HBE Corp.*, 135 F.3d 543 (8th Cir. 1998) (reducing aggregate punitive award from $4.8 million to $480,000 in race discrimination case); *FDIC* v. *Hamilton*, 122 F.3d 854 (10th Cir. 1997) (reducing $1.2 million punitive award to $264,000 in fraud case); *Kimzey* v. *Wal-Mart Stores*, 107 F.3d 568 (8th Cir. 1997) (reducing $50 million punitive award to $350,000 in sexual harassment/constructive discharge case); *Hill* v. *Airborne Freight Corp.*, 212 F. Supp. 2d 59 (E.D.N.Y. 2002) (reducing $1.8 million punitive award to $800,000 in race discrimination case); *Murray* v. *Solidarity of Labor Org. Int'l Union Benefit Fund*, 172 F. Supp. 2d 1134 (N.D. Iowa 2001) (reducing $2.5 million punitive award to $200,000 in libel case); *Komlosi* v. *Fudenberg*, 2000 WL 351414 (S.D.N.Y. Mar. 31, 2000) (reducing $10 million punitive award to $500,000 in case in which defendant was held liable for making false allegations of sexual misconduct against plaintiff); *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, 984 F. Supp. 923 (M.D.N.C. 1997) (reducing $4 million and $1.5 million punitive awards to $50,000 and $250,000 in fraud case), rev'd on other grounds, 194 F.3d 505 (4th Cir. 1999); *Leab* v. *Cincinnati Ins. Co.*, 1997 WL 360903 (E.D. Pa. June 26, 1997) (reducing $5.5 million punitive award to $35,000 in insurance bad faith case); *Rush* v. *Scott Specialty Gases*, 930 F. Supp. 194 (E.D. Pa.. 1996) (reducing $3 million punitive award to $300,000 in sex discrimination/sexual harassment case), rev'd on other grounds, 113 F.3d 476 (3d Cir. 1997); *Strickland* v. *Liberty Nat'l Ins. Co.*, 710 So. 2d 423 (Ala. 1998) (affirming

reduction of $5 million punitive award to $37,500 in case alleging fraud in the sale of insurance); *BMW of N. Am., Inc.* v. *Gore*, 701 So. 2d 507 (Ala. 1997) (reducing what initially was $4 million punitive award to $50,000 in case alleging fraudulent nondisclosure); *Foremost Ins. Co.* v. *Parham*, 693 So. 2d 409 (Ala. 1997) (reducing aggregate punitive award of $15 million to $348,000 in case alleging fraud in the sale of insurance); *Norcon, Inc.* v. *Kotowski*, 971 P.2d 158 (Alaska 1999) (reducing $3,770,261 punitive award to $500,000 in sexual harassment case); *Clifton* v. *Massachusetts Bay Transp. Auth.*, 11 Mass. L. Rptr. 621 (Mass. Super. Ct. 2000) (reducing $5 million punitive award to $500,000 in racial discrimination/hostile environment case); *Bell* v. *Helmsley*, 2003 WL 1453108 (N.Y. Sup. Ct. Mar. 4, 2003) (reducing $10 million punitive award to $500,000 in employment discrimination case); *Apache Corp.* v. *Moore*, 960 S.W.2d 746 (Tex. Ct. App. 1997) ($1,687,500 punitive award reduced to $43,370 in case alleging that negligence in construction of gas well caused it to "blow out"). See also *Inter Med. Supplies, Ltd.* v. *EBI Med. Sys.*, 181 F.3d 446 (3d Cir. 1999) (reducing what initially was $100,600,000 punitive award to $1 million in case involving various business torts).

Supreme Court, U.S.
FILED
APR 7 2003
OFFICE OF THE CLERK

Nos. 02-1096, 02-1097

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

THE ESTATE OF TOMMY SMITH, *et al.*,

Respondents.

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY & COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae National Association of Independent Insurers ("NAII") is a national trade association of over 700 member companies dedicated to expanding the choices available to the insurance-buying public, reducing the costs of insurance to its policyholders, and promoting competition. For over 50 years, NAII has represented the interests of property and casualty insurance companies and their customers throughout the United States. *Amicus curiae* State Farm Mutual Automobile Insurance Company is one of the largest automobile insurance companies in the United States and does business nationwide.

Amici believe that this brief will assist the Court by providing perspective on special issues regarding punitive damages that confront national businesses that engage in consumer transactions. Claims for punitive damages against insurance companies, manufacturers of mass produced goods, and other such consumer-oriented businesses tend to produce arbitrary and often excessive punitive damages awards. The imposition of punitive damages against such corporate defendants raises special concerns that do not arise in the context of litigation over single transactions between individuals.

This is at least partly because punitive damages law has historically developed in the context of common law tort actions between individuals. Punitive damages, as one commentator put it, developed "largely as a punishment and deterrent for trespassers, oxen thieves and other such human malefactors."[2] As a result, when the principles of common law punitive damages are applied to the conduct and decision-making processes of a large modern business, punitive damages may be awarded that are excessive as a matter of due process or where due process forbids any punishment

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief, and copies of those consents have been lodged with the Court.

[2] David G. Owen, *Problems in Assessing Punitive Damages against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 15 (1982).

at all. The problem is compounded, in some cases, by juror bias against large out-of-state businesses and manufacturers.

In particular, the assessment of reprehensibility – the most important of the constitutional guideposts set forth by this Court for determining whether a punitive award is excessive – presents difficulties in both products liability and insurance litigation. For example, the complex decision-making that results in the final design of a product may reflect a series of necessary and reasonable risk-utility determinations that, in subsequent evaluations, juries and judges find all too easy to characterize as "reprehensible." The affirmance of the massive punitive damages awards in *Romo* and *Smith* illustrates the arbitrary nature of punitive awards against large corporate defendants and the lack of coherent standards for measuring the "reprehensibility" of corporate conduct.

The *Romo* and *Smith* cases raise constitutional punitive damages issues that are of substantial importance not only to manufacturers, but also to insurance companies and other companies that deal with consumers. In this brief, *amici* address an issue of particular concern to the insurance industry, namely, the constitutionality of a punitive damages award where (as in *Romo* and *Smith*) a corporate defendant has complied with industry standards and government regulations and where there is ground for reasonable disagreement concerning the propriety of the corporate conduct at issue.

SUMMARY OF ARGUMENT

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court held that the Due Process Clause of the United States Constitution imposes constraints on punitive damage awards. The Court identified the degree of reprehensibility of the defendant's conduct as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. Accordingly, it is necessary as a constitutional matter that the determination of the degree of reprehensibility of a defendant's conduct be based on an analysis that produces fair and accurate results.

The analyses of reprehensibility by the California appellate court in *Romo* and by the Kentucky Supreme Court in *Smith* fall far short of the constitutionally required level of

fairness and accuracy. Both courts improperly discounted defendant Ford Motor Company's compliance with government regulations and industry standards and ignored the realities of complex corporate decision-making. In particular, in making product design decisions, manufacturers such as Ford necessarily and properly consider not only a variety of potential safety issues, but also other design concerns such as marketability, ease of operation, durability, and cost.

In many cases where punitive damages are imposed, including *Romo* and *Smith,* the corporate defendant had an arguable basis for believing that its chosen course of conduct was reasonable and conformed to its legal obligations towards consumers – even if a particular corporate decision turned out after the fact to have been wrong or unwise such that compensatory damages were in order for the affected consumer. Most importantly, where a corporation – whether a product manufacturer, an insurance company or other institutional defendant – has complied with government regulations or industry standards, that compliance should generally be found to establish a basis for "reasonable disagreement" as to the propriety of the defendant's conduct. "Reasonable disagreement" should negate or at least substantially lessen reprehensibility and thus weigh heavily against the imposition of punitive damages.

In the context of insurance litigation, some courts have applied the "reasonable disagreement" standard to bar punitive damages in cases where, despite the fact that a jury determines that an insurance company was incorrect in denying a claim or in interpreting the insurance contract, there was a genuine dispute or reasonable disagreement about the propriety of the insurance company's conduct. The "reasonable disagreement" standard provides a fairer and more accurate analytical basis for determining a corporate defendant's "reprehensibility" under *BMW* than the factors used in traditional punitive damages law to assess individual conduct. The use of the traditional factors with regard to corporate conduct often merely encourages anti-corporate biases on the part of judges and juries and results in arbitrary, excessive and unconstitutional punishment of corporate defendants by judges and juries in civil cases.

Amici respectfully submit that application of the "reasonable disagreement" standard in assessing the nature of a corporate defendant's conduct would help alleviate the constitutional problems raised by punitive awards such as those in *Romo* and *Smith*. Certiorari should therefore be granted to clarify the due process constraints on punitive damages and the application of the *BMW* reprehensibility guidepost where a corporate defendant's compliance with government regulations or industry standards creates "reasonable disagreement" as to the propriety of the defendant's conduct.

ARGUMENT

I. Where There Is Reasonable Disagreement as to the Propriety of the Defendant's Conduct, the Imposition of Punitive Damages Raises Significant Due Process Concerns

In *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 490 (1915), this Court set forth the basic principle that where a corporate defendant is justified in believing that a certain course of business conduct is reasonable, the infliction of punishment for that conduct "depart[s] from the fundamental principles of justice embraced in the recognized conception of due process of law." In *Danaher*, this Court set aside a $6,300 statutory penalty awarded to a telephone customer against a telephone company that had disconnected the customer's phone service pursuant to an impartially enforced regulation adopted by the company. The Court determined that because the company's regulation could have been declared unreasonable by the Arkansas legislature, but had not been, the company was "well justified in regarding the regulation as reasonable and in acting on that belief" and that imposition of penalties of $6,300 was "so plainly arbitrary and oppressive as to be nothing short of a taking of [the company's] property without due process of law." *Id.* at 490-91.

Although *Danaher* involved a statutory penalty, the relevance of the due process principle set forth in *Danaher* to punitive damages and the continuing vitality of that principle are demonstrated by this Court's decision in *BMW*. In overturning the punitive damages imposed on defendant BMW, this Court emphasized that BMW had a good faith basis to believe that it was complying with its legal obligations and

that its conduct was not tortious, let alone punishable:

> This [requirement that fraud requires a material misrepresentation or omission] invites line-drawing of just the sort engaged in by States with disclosure statutes and by BMW. We do not think it can be disputed that there may exist minor imperfections in the finish of a new car that can be repaired (or indeed, left unrepaired) without materially affecting the car's value. There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers. For this purpose, BMW could reasonably rely on state disclosure statutes for guidance. 517 U.S. at 579.

The due process principle recognized in *Danaher* has been formulated by some courts and commentators as the "reasonable disagreement" principle, or the "genuine dispute" principle. *See, e.g.*, Dorsey D. Ellis, Jr., *Fairness & Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 22-23 (1982) (for purposes of punitive damages, reckless conduct should be "narrowly defined to exclude reasonable disagreement over the relative danger and utility of an act"). In insurance claims litigation, there was early judicial recognition that where an insurance company has an arguable basis for denying a claim or for other challenged conduct, no punitive damages are warranted as a matter of law, even if a jury later disagrees with the insurance company's assessment of its obligations under the insurance policy. *See, e.g., Mack & Co. v. Lancashire Ins. Co.*, 4 F. 59, 63 (D. Mo. 1880) (to recover damages beyond the value of their destroyed property for vexatious delay in the payment of a policy, plaintiffs must establish that defendants had no reasonable ground for contesting either the validity or the amount of the claim).

Some more recent decisions in insurance cases have also applied the "reasonable disagreement" standard to constrain the imposition of punitive damages for corporate conduct that is determined after-the-fact to be tortious, where, as in *Danaher*, the company was "justified in regarding [its conduct] as reasonable." *Danaher*, 238 U.S. at 490. While these insurance cases apply the "reasonable disagreement" standard

as a matter of state common law, their analysis has constitutional relevance to the due process limits on punitive damages. For example, in *Erie Insurance Co. v. Hickman*, 622 N.E.2d 515, 520-523 (Ind. 1993), the Indiana Supreme Court determined that an award of punitive damages against the defendant insurance company could not be supported where there was probative evidence that the insurance adjuster had based her denial of the plaintiff's uninsured motorist claim on police reports and other "sources of information upon which the adjuster had a right to rely." The court explained that "just as a jury's determination that a claim was, in retrospect, incorrectly denied is not sufficient to establish a breach of the duty to exercise good faith, proof that a tort [breach of the duty of good faith] was committed is not sufficient to establish the right to punitive damages." *Id.* at 520.

The Mississippi Supreme Court has established a similar rule for distinguishing a denial of an insurance claim that was later determined to breach the insurance contract. from the denial of an insurance claim that also merited punitive damages. *See Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 232-33 (Miss. 2001). In *Jenkins*, the court held that punitive damages are improper unless the insurer both lacked an arguable basis for denying the claim, and committed a wilful or malicious wrong or acted with gross and reckless disregard. *Id.* The court concluded that these questions are in the first instance questions of law to be decided by the trial judge. *Id.* at 233; *see also Manis v. Hartford Fire Ins. Co.*, 681 P.2d 760, 762 (Okla. 1984) (insurer's withholding of payment of claim could not lead to imposition of punitive damages where there was a "legitimate dispute" regarding evidence of arson).[3]

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[3] *See also Moffet v. Kansas City Fire & Marine Ins. Co.*, 244 P.2d 228, 233 (Kan. 1952) (holding that the "[m]ere refusal to pay insurance cannot constitute wanton or malicious conduct when, as here, an actual controversy exists with respect to liability on the policy. If this were not the rule, punitive or exemplary damages could be recovered in every action involving a refusal to pay an insurance policy."); *Jackson Nat'l Life Ins. Co. v. Receconi*, 827 P.2d 118, 134 (N.M. 1992) (finding insufficient support for punitive damages where refusal to pay on a claim for failure of condition precedent in the application was not frivolous or unfounded; "unfounded" interpreted to mean "an utter or total lack of foundation for

(continued...)

The "reasonable disagreement" standard has also been used in products liability and other types of cases in drawing the line between compensatory damages and punitive damages, and ensuring that punitive damages are not the automatic consequence of liability in tort. *See, e.g., Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (in ADA case, reversing punitive award where there was a "good faith dispute" as to propriety of employer's conduct). As shown below, the reasonable disagreement standard helps to prevent arbitrary awards of punitive damages and awards of punitive damages that punish socially useful behavior on the part of corporate defendants.

II. The "Reasonable Disagreement" Standard Should Be Applied in Assessing Reprehensibility under *BMW*

In *BMW*, as in *Danaher*, the defendant was faced with the need to determine *ex ante* whether a specific course of conduct would conform to its legal obligations, in the absence of a particular statute or judicial decision addressing that conduct. As noted above, in *BMW*, 517 U.S. at 579, the defendant car manufacturer in deciding upon a course of conduct in Alabama looked to regulations and statutes in other states and concluded that it would be reasonable to conform its conduct to the strictest of those statutes. Many other companies, including product manufacturers and insurance companies, are confronted by the same need to determine *ex ante* whether a course of conduct will conform to their legal obligations. As *Romo* and *Smith* illustrate, makers of potentially dangerous, yet necessary and useful products, such as automobiles and trucks, are confronted with this problem in a par-

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[3] (...continued)
an assertion of nonliability – an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim."); *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1320 (Ohio 1983) ("[M]ere refusal to pay insurance is not, in itself, conclusive of bad faith. But when an insurer insists that it was justified in refusing to pay a claim of its insured because it believed there was no coverage of the claim, . . . such belief may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor" (omission in original) (citation omitted)).

ticularly acute form. Such manufacturers make product design decisions facing limits of knowledge, the necessity of trade offs in safety, the need to measure the cost of safety features or redesign of a product against the level of risk, and the need to produce a product that people can afford to buy. To ensure some level of accuracy, the assessment of the level of a defendant's reprehensibility in manufacturing a product should be based upon principles that take into account the realities of designing and marketing a product.

An assessment of reprehensibility that takes into account the "reasonable disagreement" standard leads to more reliable results in the determination of the amount, if any, of punitive damages that should be awarded. In assessing the behavior of corporate defendants under the "reasonable disagreement" principle, courts should look to whether the company's conduct complies with government standards or regulations and industry standards. In particular, where government regulations or standards govern a defendant's conduct, as is very often the case both with insurance companies and with car and truck manufacturers such as Ford, a defendant's compliance with such standards and regulations should be held (at a minimum) to create a presumption that there are grounds for reasonable disagreement as to whether the defendant acted reprehensibly in adopting that course of conduct. *See* Point III *infra*. In the case of manufacturers, courts should also look to whether there is room for reasonable disagreement as to the propriety of the design decisions, safety trade-offs and risk-utility calculations made by the company, such that the company may have reasonably believed that its conduct complied with its legal obligations toward consumers.

Some courts have persuasively applied such principles. For example, in *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995), the court vacated a $2 million punitive award that was based upon Honda's failure to incorporate leg guards on its motorcycles. The court held that Honda's "marketing its products in the same design of every motorcycle marketed in the world to the general public" was not as a matter of law so extreme or outrageous as to justify punitive damages. *Id.* at 1316. The court also noted that "[a]lthough certain studies indicate that leg guards are effective, no government in the world has ever required them," *id.*, and that

there was "a genuine dispute in the scientific community" as to the efficacy and desirability of leg guards. *Id.* at 1317.

In *Loitz v. Remington Arms Co.*, 563 N.E.2d 397 (Ill. 1990), in which the plaintiff was injured when the barrel of his gun exploded, the Illinois Supreme Court reversed a $1.6 million punitive award against the gun manufacturer. In contrast to the California court in *Romo*, the Illinois Supreme Court took a reasoned view of the role of prior accidents and litigation in showing the manufacturer's purported knowledge of dangers posed by its product. The Illinois court rejected the appellate court's view that the "detailed testimony about prior, similar occurrences which were made known to defendant before plaintiff's gun exploded" supported the punitive award, explaining:

> The 94 prior accidents represent about 0.003% of Remington's production of more than 3 million Model 1100 barrels during the span of time in question. The prior accidents must be considered not only in relation to the number of barrels produced by Remington during that period, but also in relation to the estimated number of times those guns would have been used. Although the latter number cannot be known with any precision, the plaintiff's trial testimony demonstrates that he had used his own Model 1100 shotgun literally thousands of times. *Loitz*, 563 N.E.2d at 404.

The Illinois Supreme Court in *Loitz* also rejected the appellate court's reliance upon the manufacturer's "inaction in the face of [an] earlier adverse decision" as an aggravating circumstance meriting punitive damages, stating:

> While it is true that Remington was made aware of [plaintiff's expert's] opinion during the course of the prior case, it cannot be said that Remington was automatically required to embrace Dr. Levinson's view as its own. The evidence presented at trial indicated that Remington began producing the Model 1100 shotgun in 1963 following extensive research into its design. Remington employs its own engineers and metallurgists and relies on their expertise. Various tests are performed at different stages of the

> manufacturing process to ensure the safety and quality of its shotguns. Remington's evidence demonstrated, however, that its manufacturing and testing procedures are not able to prevent every barrel explosion or rupture . . . . *Id.* at 405.

In *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994), the Iowa Supreme Court invoked the reasonable disagreement principle in upholding a directed verdict for the defendant on punitive damages. In *Hillrichs*, the plaintiff attempted to clear a plugged cornpicker while the machine was running and caught his hand in the rollers. *Id.* at 96. The plaintiff put on evidence that the defendant "knew, at the time it manufactured the husking bed, that farmers often attempted to unplug the husking rollers while they were operating" and that the defendant "could have installed an emergency stop device for less than $50." *Id.* at 97. The defendant's evidence showed that when its

> engineers decided not to install emergency stop devices on the . . . husker apparatus, they based their decision on the so called 'dependency hypothesis,' the theory that the product as designed would discourage farmers from making contact with the roller bed and that the plaintiff's proposed device would invite farmers to unreasonably depend on it despite the dangerousness of the husking roller bed.

Id. at 100. In upholding a directed verdict for the defendant on the issue of punitive damages, the Iowa court stated that "an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue." *Id.* (citing *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993)).

In the decisions discussed above, certain recurring themes emerge from the courts' detailed examination of the corporate conduct in question. Those themes – including compliance with government regulations and the recognition of the multiple competing considerations that go into corporate decision-making – can be brought together under the general rubric of the "reasonable disagreement" standard. As shown more fully below, use of that standard in assessing a corporation's conduct under the *BMW* reprehensibility guide-

post is critical to reaching a reasonably accurate assessment of whether, as a matter of due process, punitive damages are warranted at all, and, if so, in what amount.

III. Under the "Reasonable Disagreement" Standard, a Defendant's Adherence to Government and Industry Standards Should Weigh Heavily Against Punitive Damages

In both *Romo* and *Smith*, the courts improperly discounted the fact that Ford had complied with industry and government standards. In *Romo*, as the California court acknowledged, the evidence showed that the roof strength of plaintiffs' vehicle, a 1978 Bronco, "far exceeded the passenger car standard that existed" at the time the Bronco was manufactured. (*Romo* Pet. App. at 28a.) The court acknowledged that the Bronco's roof even exceeded the "current standard" for SUVs, but dismissed this as "merely coincidental." (*Id.* at 28a-29a.) Likewise, the court gave no weight to the fact that "other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles." (*Id.* at 36a.) In *Smith*, the plaintiff's expert admitted that "all four major American automobile manufacturers equipped their vehicles with automatic transmissions having the same design as the transmission installed by Ford" in the seventeen-year-old truck used by Tommy Smith. (*Smith* Pet. App. 41a (Cooper, J., dissenting)). Moreover, the NHTSA had concluded after an extensive investigation that "vehicles equipped with a transmission of the type installed in [the] Ford F-250 pickup truck [used by Smith] were not sufficiently unsafe to warrant recall." *Id.* at 53a.

Contrary to the decisions in *Smith* and *Romo*, compliance by a corporate defendant with government and industry standards creates a ground for "reasonable disagreement" and should weigh heavily against the imposition of punitive damages. When government agencies or an entire industry have reached the same conclusion as the defendant, it is apparent that reasonable people could reach that conclusion, and the degree of reprehensibility under *BMW* – if reprehensibility exists at all – is necessarily very low. Thus, for example, where a manufacturer defendant has made a product in compliance with government standards, such compliance "would

be admissible evidence tending to negate charges of negligent and defective design" and should "presumably weigh against an award of punitive damages." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 893 (2000) (Stevens, J., dissenting). Indeed, Professors Prosser and Keeton have stated that "compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 & n.41 (5th ed. 1984). *See also Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994) (punitive damages prohibited where defendant complied with federal safety standards).[4]

As Professor David Owen has explained:

> Many government standards . . . are adopted with studied care, and some are placed close to the line of feasible technology; others are set in a wide gray area where the difficulties of defining defectiveness (the 'proper' mix of safety and its tradeoffs) are especially great. In theses circumstances, particularly if many in the industry have come to treat the provision as the proper safety norm, proof of compliance with the regulation or statute ordinarily should be deemed to be conclusive proof of good faith and hence a conclusive defense to a punitive damages claim.

Owen, *supra*, at 41-42. *See also Welch v. Gen Motors Corp.*, 949 F. Supp. 843 (N.D. Ga. 1996) (punitive damages not warranted where automobile's braking system and instrument panel met applicable federal regulations); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699 (D. Md. 1993) (defendant who complied with federal regulation regarding product alert did not act with malice and therefore was not liable for punitive damages); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986) (award of punitive damages is unjust where de-

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[4] Some states, by statute, bar punitive damages where the alleged wrongdoer has complied with existing government regulations. *See, e.g.*, Ohio Rev. Code Ann. § 2307.80(C) (the manufacturer of a drug will not be liable for punitive damages in a product liability claim if the drug that allegedly caused the harm was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the FDA); Or. Rev. Stat. § 30.927.

fendant had complied with requirements of National Traffic Motor Safety Act regarding fuel system integrity).

Likewise, while adherence to industry standards is not always a defense to liability in a negligence action, *see, e.g.*, *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932), it constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant punitive damages. In the insurance context, compliance with industry standards has been held to negate the culpable state of mind required for punitive damages. *See Hibler v. Conseco*, 744 N.E.2d 1012, 1022 (Ind. Ct. App. 2001) (conduct understood by insurer to be "an accepted practice within the industry" did not support "culpable state of mind" warranting punitive damages); *cf. Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1985) (bad faith claim against insurer requires "proof of the standards of conduct in the industry"). In products liability cases, compliance with industry standards has been held to "show[] a reasonable disagreement over the relative risks and utilities" of a defendant's conduct in designing and manufacturing a product. *See Mercer v. Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (reversing punitive damages; defendant manufacturer's adoption of Underwriters Laboratory standard for testing and performance of smoke detectors showed that there existed grounds for "reasonable disagreement"). As one commentator has stated, "[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm." Owen, *supra*, at 40-41. Accordingly, compliance with industry custom "has been accorded substantial weight in the punitive damages context." *Id.* at 40. *See also, e.g., Drabik v. Stanley-Bostich, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (reversing denial of directed verdict on punitive damages where defendant's conduct was consistent with industry practice).

Issues regarding compliance with governmental and industry standards repeatedly arise in the insurance context. In

each of the fifty states, insurance companies are subject to comprehensive laws and regulations that govern their obligations to policyholders. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) ("States, as a matter of tradition and express federal consent, . . . maintain[] precise and detailed regulatory schemes for the insurance industry."). Accordingly, *amici* urge that under *Danaher* and *BMW* a defendant's compliance with government regulations and industry standards should, as a matter of due process and fundamental fairness, weigh strongly against the imposition of punitive damages and should certainly preclude a punitive award of millions of dollars, such as the awards upheld in *Smith* and *Romo*.

Such compliance, whether by a manufacturer or insurance company or other corporate defendant, provides a clear marker for distinguishing between conduct that is merely tortious and conduct that merits punitive damages. By discounting evidence of compliance with government and industry standards, the courts in *Smith* and *Romo* contravened the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" that "dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Certiorari should be granted to clarify the due process constraints on punitive damages and the application of the *BMW* reprehensibility guidepost where a corporate defendant's compliance with regulations or industry standards creates "reasonable disagreement" as to the propriety of the defendant's conduct.

IV. Using Traditional Factors To Assess the Reprehensibility of Large Institutional or Corporate Defendants Produces Skewed Results and Arbitrary Punitive Awards

The need for this Court's guidance in the application of the *BMW* reprehensibility guidepost to conduct by businesses and manufacturers is demonstrated by the manifest shortcomings of the analysis provided by the courts in *Smith* and *Romo*. Those courts attempted to analyze reprehensibility by reference to traditional factors such as knowledge, recklessness, repeated conduct, physical injury and profit motivation.

Such factors, having been developed in tort cases between individuals, often do not produce constitutionally acceptable assessments of the conduct of corporate defendants. Rather, the traditional analysis does nothing to curb biases against large out-of-state corporations, encourages misunderstanding and punishment of socially beneficial behavior and produces punitive awards that are unfair, arbitrary and excessive.

The traditional reprehensibility factors are, almost by definition, present in products liability cases such as *Romo* and *Smith*. For example, the traditional "scale" of reprehensibility finds conduct that results in physical injury or death more reprehensible than conduct that results merely in economic injury. *See BMW*, 517 U.S. at 576. In products liability cases, the use of this factor automatically puts the defendant high on the reprehensibility scale. Likewise, a corporation that manufactures cars or other products whose use carries some inherent danger will likely have knowledge of the statistical likelihood (or certainty) that injuries or deaths will result from the use of its product. In litigation, such knowledge will inevitably be characterized by plaintiff's counsel as a knowing or reckless indifference to the safety of a plaintiff who is later injured by the product, again automatically placing the defendant corporation high on the reprehensibility scale. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stanford L. Rev. 547, 574 (2000). Moreover, because corporations are in business to make money, the alleged motive of the corporate defendant will always be greed. *See id.* at 566. In products liability cases, these factors will likely be present even where "reasonable disagreement" existed regarding the risks and utilities of the defendant's conduct. Therefore, in assessing reprehensibility in products liability cases, it is important to give substantial weight to the "reasonable disagreement" principle.

The analysis provided by the California Court of Appeal in *Romo* exemplifies the problems with traditional reprehensibility assessment in products liability cases. The court began its constitutional reprehensibility analysis with the proposition that because deaths had occurred in the automobile accident at issue, "the award here cannot be compared to cases 'involving a business fraud resulting only in economic harm.'" (*Romo* Pet. App. 38a.) The court determined

that Ford's conduct involving "mass production and marketing" of a product "purely for defendant's economic betterment" (*Romo* Pet. App. 38a) was "despicable" and, thus, grossly reprehensible because Ford marketed a product that "could kill people." (*Romo* Pet. App. 25a-26a.) In *Smith*, likewise, the Supreme Court of Kentucky found Ford's conduct to be substantially reprehensible because Ford continued to market its trucks "after Ford knew of the dangerous propensity of its transmission" (*Smith* Pet. App. 17a) – despite the fact that the NHTSA had decided not to recall the vehicles and that all four major American manufacturers used the same transmission design.

Jurors' sympathies and cognitive biases compound the risk that punitive awards in products liability cases will be skewed. Where injuries are severe, juries may be reluctant to blame the injured, preferring in the case of a car accident, for example, to blame the car rather than the driver. Furthermore, it is easy for plaintiff's lawyers to demonize large, out-of-state corporations, and jurors' "natural sympathy for a seriously injured person" may be "reinforced when the defendant is a manufacturer, for many persons are hostile toward major institutions in general and 'big business' in particular." Owen, *supra*, at 12.[5] Thus, it is not surprising that, as jury research has shown, juries tend to punish corporations simply for having conducted a risk analysis. *See* Viscusi, *supra*, at 559 (mock jury research showed that "[u]ndertaking a benefit-cost analysis of risk does not help the company, but instead boosts the punitive damages awarded by 47%."). In addition, what a jury may view as a significant number of prior, repeated incidents evidencing knowledge and recklessness warranting a

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[5] *See also* Ellis, *supra*, at 42 ("In the emotionally charged context of a civil trial, which lacks the procedural safeguards of a criminal proceeding, where the jury is invited to assess punitive damages with little guidance and less constraint, decisions will be affected by latent biases or redistributional inclinations. If juries dislike or do not understand cost-benefit analyses, [or] distrust corporations, . . . those factors are likely to bias their decisions."). Notably, in his dissenting opinion in *Smith*, Justice Cooper of the Kentucky Supreme Court characterized the punitive award in that case as "an outrageous verdict" by a "runaway jury" that would "redistribute the wealth of an out-of-state corporation with requisite deep pockets." (*Smith* Pet. App. 32a.)

large punitive award, may in fact involve only a tiny percentage of the numbers of products sold and being used uneventfully by millions of consumers. *See, e.g.*, *Loitz*, 563 N.E.2d at 404 (vacating punitive award; stating that 94 prior accidents represented only 0.003% of 3 million gun barrels).

The weighing of costs and benefits or risk and utility by a manufacturer in making design decisions is desirable, socially beneficial conduct that should be encouraged, not punished. Viscusi, *supra*, at 550 ("we want corporations to think about risks in a systematic manner."). Basing punitive damages liability on the defendant's knowledge through cost-benefit analysis of the risk of injury has a "perverse effect on incentives," reducing the "resources committed to ascertaining the relative harm that would result from alternate product designs and to exploring means of reducing expected loss," thus, "deter[ring] the very activities that efficient liability rules promote." Ellis, *supra*, at 50.[6] *See also In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (noting danger of deterring "good conduct that risks being misunderstood as bad, or that will look bad in retrospect").

Many competing factors are considered in designing a product, and while safety is important, manufacturers of products "must also consider elements such as marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Prod. Liab. Litig.*, 74 Ky. L.J. 1, 88-89 (1985). Ultimate safety is not economically feasible, either from the manufacturer's viewpoint or from the viewpoint of the consuming public. Cars cannot be manufactured like tanks, and safety trade-offs, although

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[6] Likewise, in the insurance context, the too ready imposition of punitive damages may result in deterring reasonable investigation of invalid or fraudulent claims. *See, e.g., Savio*, 706 P.2d at 1275; Alan O. Sykes, *"Bad Faith" Breach of Contract by First-Party Insurers*, 25 J. Legal Stud. 405, 434-35 (1996) (noting "rampant" insurance fraud and stating: "[i]f reasonable efforts to reduce fraud can become 'bad faith' down the road, . . . insurers may simply give up on them"). The "reasonable disagreement" standard helps strike a balance between competing social considerations in both the products liability and the insurance contexts.

not palatable to juries, are necessary. The costs of avoiding all risk of harm are "potentially infinite," and requiring a manufacturer to bear them or face a huge punitive award will simply mean that "society would lose the benefit of the productive activity." *Exxon Valdez*, 270 F.3d at 1244.

Problems of hindsight create a further potential for excessive punitive awards, when juries and courts examine a manufacturer's risk-utility decisions. Juries and courts, assessing a defendant's reprehensibility after the fact of an accident, do not necessarily "compare expected benefits and costs based on the state of information before the accident." Viscusi, *supra*, at 563.[7] Rather, "jurors may compare the enormous cost to the victim with the relatively negligible cost of the safety improvement." *Id.* However, although the cost of a single "fix" for each car or other product may seem low, "at the time of design, the fix was merely one of a great many options considered for inclusion in the total design mix, and . . . human injury from any one was at most at that time only a foreseeable risk." Owen, *supra*, at 35. With respect to car design in particular, there are "hundreds of design changes that can be made to enhance the safety of [a] vehicle . . . ranging in cost per unit from pennies to hundreds of dollars. Although the cost of any one change may be small in isolation, all [that can be] fairly ask[ed] of management and its engineers in the punitive damages context is that safety considerations not be deliberately excluded or shunted far to the rear in deciding on the total design mix involved." *Id.* at 34.

Moreover, cost-benefit analysis, by its very nature, produces "bad" documents – that is, documents that acknowledge the existence of safety risks. In fact, "the more a manufacturer is truly concerned about its product's safety, the more

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[7] Empirical jury research confirms the serious effect of hindsight bias on jury determinations of punitive damages. *See* Cass R. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* 96-107, 211, 222 (2002). Hindsight bias exists in insurance litigation as well. *See, e.g.*, James M. Fischer, *Should Advice of Counsel Constitute a Defense for Insurer Bad Faith?*, 72 Tex. L. Rev. 1447, 1485 n.90 (1994) ("Hindsight bias reflects the tendency of decisionmakers to find that what did occur should have been foreseen . . . . In an insurance bad faith case involving an excess verdict, the fact of the verdict influences the decisionmaker's perception of the probability of the excess verdict.").

it will encourage self-criticism and 'negative' analyses of the product within the company." Owen, *supra*, at 17.[8] Thus, "in the documentary background of most inherently dangerous products will be some fair number expressing concern over many of the significant choices in the design process." *Id.* The result in later litigation is that "[a] skillful plaintiff's lawyer will often be able to find and string together a series of such documents, plucked from context among the thousands or millions in the company's files, that may make the manufacturer look particularly insensitive to consumer safety and more concerned about cutting costs." *Id.* at 19.

Accordingly, in evaluating such documents for purposes of punitive damages, it is important that courts be aware of the realities of the design process and, in particular, the reality that manufacturers of products such as automobiles "must design them in many different ways they know with virtual certainty will result in harm or death at some time to a certain number of unfortunate, statistical persons." *Id.* at 15. In *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986), the Florida Supreme Court distinguished such knowledge from the knowledge of an asbestos manufacturer. In assessing the "reprehensibility" of a car maker's design and placement of a fuel tank, the court emphatically rejected the proposition that the car manufacturer could be equated to an asbestos manufacturer who had been "shown to have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product . . . ." *Id.* (refusing to follow *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242 (Fla. Dist. Ct. App. 1984)). The Florida Supreme Court held that the *Johns-Manville* "standard [was]

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[8] In *Smith*, in assessing reprehensibility, the Kentucky court stressed a document by a Ford engineer that identified the purported defect in the transmission and purportedly "recommended an alternative." (*Smith* Pet. App. at 14a, *but see id.* at 37a-42a (opining that Ford was entitled to directed verdict on issues of causation and defect) (Cooper, J., dissenting)). Notably, that document recommended not an existing alternative but that "design and development be directed toward" an alternative. (*Id.* at 14a n.24.) Likewise, the California court relied upon various corporate documents, including a "corporate memo" apparently advocating consideration of a stronger roof strength standard. (*Romo* Pet. App. at 26a.)

clearly erroneous when applied to a claim that a motor vehicle was insufficiently crashworthy when precautions had been taken to insure its crashworthiness." *Id.* at 826.

The Florida Supreme Court's opinion in *Wolmer* stands in stark contrast to the opinions of the courts in *Smith* and *Romo*. Indeed, in upholding punitive damages against Ford in the *Smith* case, the Kentucky Supreme Court chose to follow a case in which punitive damages were assessed against an asbestos manufacturer and in which the Kentucky Supreme Court had held that asbestos defendants were not insulated from liability by industry practice "just because every member of that industry was manufacturing and distributing a product known to be inherently dangerous." (*Smith* Pet. App. at 17a & n.38.) The Kentucky court ignored Kentucky precedent holding the manufacturer of an auger not liable even for compensatory damages where the auger "conformed to the design as to safety developed by the industry," despite the "occurrence of other injuries." *See Jones v. Hutchinson Mfg. Inc.*, 502 S.W.2d 66, 70-71 (Ky. App. 1973). The Florida Supreme Court in *Wolmer* was correct, and the Kentucky Supreme Court in *Smith* was wrong. The manufacture of a car or truck conforming to government and/or industry standards cannot rationally be equated to the manufacture of asbestos.

Under the "reasonable disagreement" standard, the fact that a manufacturer has based its design decisions on a risk analysis should weigh against punitive damages, even if a particular design decision turns out to have been wrong or unwise such that compensatory damages for the injured product-user are in order. That conclusion is mandated not only by the "reasonable disagreement" standard, but also by the considerations of due process and fundamental fairness upon which this Court's decision in *BMW* is based. This Court should grant certiorari to clarify the contours of the due process limitations on punitive damages in products liability, insurance, and other cases against corporate defendants.

CONCLUSION

The petitions for certiorari should be granted.

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Supreme Court, U.S.
FILED
APR 21 2003
CLERK

No. 02-1096

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

ESTATE OF TOMMY SMITH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of the Commonwealth of Kentucky

SUPPLEMENT TO BRIEF IN OPPOSITION

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I. INTRODUCTION

This Court's recent decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 537 U.S. __, 2003 WL 1792106 (April 11, 2003), prompts this supplemental brief because it seems that *Campbell* might have some relevance to the instant case. As explained below, however, that apparent relevance evaporates when the differences between that case and this one are explored. Although *Campbell is* obviously important in its own right, it breaks no new ground but merely reiterates and applies the Court's decision in *BMW of N.A., Inc. v. Gore*, 517 U.S. 559 (1996). Indeed, as the Court explained, "[u]nder the principles outlined" in *BMW*, *Campbell* "was neither close nor difficult." *Campbell*, slip op. at 8. As such, *Campbell* provides no basis for plenary review of the Kentucky Supreme Court's decision in this case. Furthermore, because, as explained in Respondents' Brief in Opposition, the court below provided the "[e]xacting appellate review" required by *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and carefully applied *BMW*'s three-part test for excessiveness, *Campbell* provides no "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)(per curiam). Thus, a GVR order for reconsideration in light of *Campbell* is unnecessary and inappropriate. *Id.*

II. NEITHER PLENARY REVIEW NOR A GVR ORDER IS APPROPRIATE BECAUSE THE COURT BELOW PROPERLY APPLIED *BMW*'S FIRST, "REPREHENSIBILITY" GUIDEPOST

BMW instructed lower "courts to determine the reprehensibility of a defendant's conduct by considering" five factors: whether [1] "the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or

was an isolated incident; [5] and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, slip op. at 8, citing *BMW*, 517 U.S. at 576-77. As discussed in Respondents' Opp. Cert. at 17-23, the punitive damages awarded by the jury and reinstated, after remission, by the court below, were warranted, as Ford's conduct implicated each of these aggravating factors. *See* opinion below in Ford's Appendix at 16a-17a.

First, the "harm" inflicted by Ford on Tommy Smith—death—was not only "physical" but violent, painful, complete, and irreversible, 17a. The economic losses inflicted on by Mr. Smith's surviving spouse and young daughter were similarly grave: the "total loss of his power to labor and earn money." *Id.* These severe physical and financial injuries were far greater than the $4,000 loss occasioned by the bad paint job at issue in *BMW*, and the "minor economic injuries" at issue in *Campbell*. *Campbell*, slip op. at 16. *See* Cert. Opp. at 24.

Second, the jury specifically found, 72a, and the court below confirmed, that Ford's misconduct was not merely "tortious" (in designing a product that was dangerously defective), but "flagrant[ly] indifferent," 14a, and "intentionally malicious," 72a inasmuch as Ford "continued producing and installing such transmissions" long after it knew that they were dangerously defective, and thus "evinced an indifference to or a reckless disregard of the health or safety of others." *Campbell*, slip op. at 8, citing *BMW*, 517 U.S. at 576-77.[1]

Third, despite the fact that the "financial vulnerability," *Campbell*, slip op. at 8, citing *BMW*, 517 U.S., at 576-577,

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[1] "There is no doubt that for at least seven years after Ford knew of the dangerous propensities of the C-6 transmission, it continued producing and installing it in its vehicles . . . . [B]y Ford's own engineers and through many consumers, some of whom were maimed or killed, Ford was forcefully informed that its transmission was dangerous." 17a.

of Mr. Smith and his family was neither a matter of contention at trial nor a factor explicitly considered by the jury and by the courts below, undoubtedly they were financially vulnerable and powerless, both in absolute terms, *see* 32a (Mr."Smith's wages and hours . . . would have produced a gross income of $22,327.76 per year"), and comparative ones.[2]

Fourth, Ford's own witnesses revealed that Ford's malicious and intentional "[mis]conduct involved repeated actions"—specifically, repeated decisions not to redesign the C-6 transmission, not to recall and retrofit improvements to existing C-6 transmissions, or not warn to foreseeable users about C-6 related hazards—rather than being an unusual or "an isolated incident." *Campbell*, slip op. at 8, citing *BMW*, 517 U.S., at 576-577.[3]

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[2] Far from being without a "strong local presence," and thus potentially subject to jury bias against out-of-state corporations, *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994), Ford is not only the second largest domestic automaker in the country, but, with 10,900 workers in Kentucky, Ford is also the largest private employer and the largest automaker in the state. www.thinkkentucky.com/kyedc/pdfs/KYProfile.pdf. Kentucky is particularly dependent on and thus hospitable to the auto industry, which has "announced or located" "over 300 auto-related plants . . . in Kentucky since 1986, making Kentucky fourth in total automotive . . . production" in the U.S. *Id.* at 2. Similarly, 5.7% of "Kentucky's workforce is employed in an automotive-related industry." www.edc.state.ky.us/kyedc/pdfs/KY_Auto_Industry.pdf. Nor are Kentuckians generally hostile to business or out-of-state corporations. Thus, "Kentucky is currently ranked second in the U.S. for overall success in attracting new and expanding industries for the period from 1999-2001," ThinkKentucky.com, ANNUAL REPORT: 2001, at 9 *at* www.edc.state.ky.us/kyedc/annual_reports/2001_annual_report.pdf, and "23 of the 'Fortune 25'" largest U.S. corporations have manufacturing or service facilities in Kentucky." ThinkKentucky.com, KENTUCKY'S BUSINESS CLIMATE, at 1, *at* www.thinkkentucky.com/kyedc/pdfs/kybc.pdf.

[3] Thus, Ford's own witnesses confessed, and memos from Ford's Principal Engineer for Safety Systems and other Ford employees corroborated, that hundreds of people had been killed, and thousands

Finally, pursuant to the applicable Kentucky punitive damages statute, the jury was explicitly instructed, RA28—and, by special interrogatories, expressly found, 72a—that Mr. Smith's death "was the result of intentional malice" rather than a "mere accident." *Campbell*, slip op. at 8, citing *BMW*, 517 U.S. at 576-77. The court below, pursuant to *Cooper*, independently evaluated the evidence and reached the same conclusion. 14a.

In light of these factors, the court below concluded that Ford's willful decisions to continue to market a product it "knew" not only had "dangerous propensities" but a deadly track record was "substantial[ly]" "reprehensib[le]."17a. This conclusion is consistent with *Campbell*'s guidance regarding the cumulative effect of the aggravating factors identified in *BMW*. 517 U.S. at 576. Thus, while "[t]he existence of any one of these [five] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect," *Campbell*, slip op. at 8, the converse also is true: the existence of *all five factors* certainly tips the scales in favor of the finding of the jury and the decision by the court below that Ford's misconduct was thoroughly reprehensible and opprobrious.

A. Ford Was Not Punished for the Extraterritorial Effects of Its Misconduct or for Dissimilar Acts

Significantly, unlike the Utah Supreme Court, the court below did not attempt to enhance the reprehensibility of Ford's intentional and malicious misconduct—or increase the amount of punitive damages—by highlighting the extraterritorial effects of Ford's post-design misconduct, or by focusing on "dissimilar acts" of unlawful conduct.

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more injured, in tens of thousands of C-6 related accidents that were well-known to Ford more than five years before Ford built the truck that killed Tommy Smith. Cert. Opp. at 7-8 & nn.4-6 (quoting Ford's witnesses, RA4-7, and Ford's internal memos, RA14-19). *See* also 17a.

Campbell, slip op. at 10-12. *See* Opp. Cert. at 6-10. Nor did the Kentucky Supreme Court use this case "as a platform to expose, and punish, the perceived deficiencies" of Ford's "operations throughout the country." *Campbell*, slip op. at 9. Indeed, that court never mentioned Ford's nationwide practices regarding C-6 equipped vehicles or any other Ford product or the effects any such practices might have had outside Kentucky. *See* Opp. Cert. at 6-10.[4]

Because the court below carefully followed the *BMW* approach that this Court reiterated in *Campbell* and because nothing in *Campbell* would give the court below any reason to doubt either its method or its conclusion about the reprehensibility of Ford's conduct, the decision in *Campbell* would have no bearing on the Kentucky Supreme Court's deliberations if this case was remanded for reconsideration in light of *Campbell*. Consequently, *Campbell* should have no bearing on this Court's decision to grant certiorari or to issue a GVR order.

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[4] The Respondents' evidence and arguments also differed significantly from their counterparts in *Campbell*. From "their opening statements onward, the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities," *Campbell*, slip op. at 10, maintained that "position . . . throughout the litigation," *id.*, and presented more than half a dozen witnesses and scores of documents as part of their affirmative case in support of punishment of extraterritorial conduct or dissimilar acts. Cert. Opp. at 6-8 & n.3 (citing State Farm's Merits Brief in *Campbell*). In this case, by contrast, the Respondents did not introduce any evidence regarding the extraterritorial effects of Ford's misconduct or any dissimilar acts and did not ask the jury to award any punitive damages on those grounds. *See* Cert. Opp. at 5-12. Indeed, what scant evidence was presented to the jury on the number of nationwide accidents, injuries, and deaths caused by C-6 transmissions—amounting to less than two minutes of testimony over a three-and-a-half-week-long trial—was introduced, invited, or provoked by Ford after the close of the plaintiffs' case and after the trial court had warned Ford about the dangers of "opening the door" to such evidence. Cert. Opp. at 7-11 & n. 4-7.

III. NEITHER PLENARY REVIEW NOR A GVR ORDER IS APPROPRIATE BECAUSE THE COURT BELOW PROPERLY APPLIED *BMW*'S SECOND, "RATIO" GUIDEPOST

While *Campbell* underscored this Court's long-standing reluctance to limn a "bright-line ratio which a punitive damages ratio cannot exceed," *Campbell*, slip op. at 14, it also suggested that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process," *id.*, and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of . . . due process." *Id.* at 15.

These observations, while succinct, do not overrule or depart from the precedents of this Court that guided the court below. Indeed, as the Court stressed, these suggestions—which do not rise to the level of constitutional commands—are simply restatements of "our jurisprudence." *Campbell*, slip op. at 14. That fact, combined with three others discussed below make plenary review unnecessary and a GVR unwarranted inasmuch as it is highly unlikely that the court below would alter its assessment of Ford's culpability or further remit the punitive damages award in this case.

First, the five-to-one ratio in this case is obviously in single-digit range. Second, the nation's leading law and economics scholars agree that in awarding compensatory damages in wrongful death cases juries and courts invariably fail to fully estimate (and thus fully compensate for) the value of the decedent's life to himself (and not just his or her survivors), which therefore causes "systematic undeterrence" of dangerous or malicious conduct.[5] Finally,

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[5] The level of compensatory damages awards in personal injury cases is often "too low in practice to accomplish proper deterrence." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 941 (1998). This is particularly so in

unlike the situation in *Campbell*, where *none* of the five aggravating factors previously identified by the Court was present, in this case *all five* were implicated. *See* Section II, *supra*. Thus, where, as in this case, the conduct that gives rise to liabilty for punitive damages is as reprehensible as Ford's was, a ratio higher than 1:1 is perfectly appropriate and certainly would be considered so by the court below. For these reasons, neither plenary review nor an order for a GVR is warranted.

IV. NEITHER PLENARY REVIEW NOR A GVR ORDER IS APPROPRIATE BECAUSE THE COURT BELOW PROPERLY APPLIED *BMW*'S THIRD, "COMPARABLE PENALTIES" GUIDEPOST

In *Campbell*, this Court did not "dwell long" on *BMW*'s third, "civil penalties authorized or imposed" guidepost, *Campbell*, slip op. at 18, citing 517 U.S. at 575, and *Campbell*'s abbreviated discussion of that factor provides scant reason for the Court to grant certiorari or to order a GVR in this case. Indeed, the analyses undertaken by the Utah and Kentucky Supreme Courts of this guidepost are so divergent that *Campbell*'s condemnation of the former's flawed conceivable-criminal-penalties approach can hardly be a basis for overturning the comparable-punitive-awards

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wrongful death cases. *Id.* 111 Harv. L. Rev. at 941-42 & n.229. As Judge Posner and Prof. Landes explain: "The limitation of damages [in wrongful death cases] to survivors' pecuniary loss is very peculiar. It implicitly assumes--if, as we generally believe to be the case, tort law seeks to internalize the costs of accidents--that the average person derives no utility from living. He does not work for himself, he works solely for his family. This cannot be right, and it results in a systematic underestimation of damages in wrongful-death cases." WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987). *See* also David Haddock, Fred McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Cal. L. Rev. 1, 4 & n.10 (1990); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Cal. L. Rev. 133, 142-43 (1982).

method proposed by Ford, Opp. Cert. at 27-28, and used by the court below. *See* 18a-20a.

V. THE BRIEFS FILED BY FORD'S *AMICI* PROVIDE NO INDEPENDENT GROUNDS FOR PLENARY REVIEW OR A GVR ORDER AS THEY ARE PREDICTED ON "FACTS" CONTRADICTED BY THE EVIDENCE IN THIS CASE, AND RAISE ISSUES NEITHER IMPLICATED BY THIS CASE NOR RULED ON BY THE COURT BELOW

Ford's *amici* obviously view this case as an opportunity to advance pet theories about what this Court must do about the ostensibly disastrous state of punitive damages law, especially in the supposedly unique contexts of personal injury and products liability cases. Regardless of the merits of *amici*'s diverse recommendations—all of which are predicated on the notion that the Fourteenth Amendment's Due Process Clause authorizes this Court both to federalize a traditional province of state law and to strip state juries and state courts of their historic right to evaluate punitive liability and punitive damages on a case-by-case basis—*amici*'s arguments should have no bearing on this Court's decision on whether to grant certiorari or order a GVR in this case. The reason is simple: *amici*'s briefs are predicated on "facts" contradicted the findings of the jury and the courts below, and raise issues neither implicated by this case nor ruled on by the court below.

The irrelevance of these briefs to the questions actually presented by this case is exemplified by the fact that every single *amicus* brief is based on the alleged facts that: (1) Ford's C-6 design met written industry standards; (2) that design also satisfied federal safety standards and regulations; (3) all automakers used the same design; (4) NHTSA gave Ford a clean bill of health; (5) most juries did the same; (6) Ford did not act with malicious intent; and (7) Respondents asked the jury to punish Ford on behalf of all

the people killed by C-6 equipped vehicles.[6] As demonstrated in detail, however, in Respondents' Opp. Cert., the evidence demonstrated that: (1) there were no relevant "industry standards," only an irrelevant industry "recommendation" on uniform transmission patterns; Opp. Cert. at 20 and RA20-21; (2) there were no relevant governmental safety or design standards or regulations, *id.*; (3) while all contemporary transmission designs may have shared some common features, the C-6 design was sufficiently different from the transmissions designed by other automakers (and, indeed, sufficiently different from other Ford-designed transmissions), that C-6 transmissions caused a disproportionately higher rate of accidents, injuries, and deaths, *id., see Center for Auto Safety (CFAS) v. Lewis*, 685 F.2d 656, 660 (D.C. Cir. 1982); (4) NHTSA's investigation:

> *had been terminated without a final determination on the existence of a defect*, when NHTSA and Ford entered a settlement agreement that required Ford to notify owners about the possibility of a defect. Under the settlement agreement, however, *NHTSA explicitly reserved the right to commence a new proceeding on the alleged defect if additional facts warranted such action.*

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[6] *See, e.g.*, Brief *Amici Curiae* of the Alliance of Auto. Mfrs., at 8 ("Due process should foreclose punishment" because Ford "complie[d] with an on-point federal standard."); Brief *Amici Curiae* of Twenty Leading Non-Auto Cos., at 3 ("Ford complied with applicable regulations and industry standards"), *see id.* at 7; Brief *Amici Curiae* of Nat'l Ass'n of Ind. Insurers, at 3 (Ford's compliance with "government regulations or industry standards" established "reasonable disagreement" that should bar punitive damages); Brief *Amici Curiae* of the Prod. Liab. Adv. Council, at 7, 12 (discussing NHTSA and "numerous other juries"), at 13 (asserting Ford "did not act with malicious intent"); at 17 (asserting Respondents "prevail[ed] upon the jury to punish [Ford] on behalf of all 200 people who plaintiff alleged were killed as a result of Ford's design choice.").

CFAS v. Dole, 828 F.2d 799, 802 (D.C. Cir. 1987) (emphases added), (vacated on other grnds, *CFAS v. Dole*, 846 F.2d 1532 (D.C.Cir. 1988)), citing *CFAS v. Lewis,* 685 F.2d at 661 n.5;[7] (5) the unknown number of cases in which juries found that C-6s were not defective is factually suspect (tellingly, Ford has never revealed how many verdicts were actually involved) and legally irrelevant. Cert. Opp. at 19 & n.12; (6) the jury found that Ford's misconduct was intentionally malicious, 72a, and that finding has become final and binding; and (7) Respondents did not ask the jury to assess punitive damages on the basis of the more than 200 people killed in C-6 related accidents.

Because the arguments and proposals of Ford's *amici* are based on false and irrelevant premises and raise issues neither raised in nor ventilated by the court below, those briefs should have no weight in evaluating whether this Court should grant plenary review or order a GVR.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Respondent's Brief in Opposition, this Court should deny the petition for a writ of certiorari and decline to order a GVR.

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[7] NHTSA chose to settle its case against Ford because Ford agreed to warn to all C-6 owners and because NHTSA otherwise "would have faced great difficulties in sustaining its burden to prove the existence of a defect, because the interaction between driver and vehicle seemed a critical factor in the transmission malfunctions. Even if the Department ultimately prevailed, the enforcement action would probably have lasted at least four years during which time approximately six million of the vehicles in question would have been retired from service. Third, the Ford investigation involved an enormous drain on Department resources. At the time of settlement six of the thirty-two ODI [Office of Defects Investigation] staff engineers were working full time on the Ford case; an additional ten engineers were devoting over thirty percent of their time; and 'ODI personnel resources were so overtaxed that the conduct of additional safety defects investigations was impaired.'" 685 F.2d at 663.

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April 21, 2003

Supreme Court, U.S.
FILED
APR 22 2003
CLERK

No. 02-1096

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
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James S. Kunen, RECKLESS DISREGARD
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REPLY BRIEF OF PETITIONER

This Court's ruling in *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, slip op. (U.S., Apr. 7, 2003), directly addresses several of the questions presented in the petition, and readily demonstrates that the punitive damages award in this case violates due process. At a minimum, the Court should grant certiorari, vacate the judgment, and remand the case for reconsideration ("GVR") in light of *State Farm*.

But this case—along with *Ford Motor Co. v. Romo*, No.02-1097 (pet. for cert. pending) and *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002) (pet. for cert. forthcoming)—squarely presents questions, not implicated in *State Farm*, regarding the application of *BMW*'s reprehensibility guidepost to cases involving activities that, like product design, are enormously beneficial to society but that *also* necessarily create risks of serious injury and death. That three cases raising strikingly similar questions have reached this Court almost at the same time shows the critical, recurring nature of those questions. It also shows that these questions have had ample opportunity to percolate in the lower courts. Plenary review is therefore warranted.

I. GVR IS REQUIRED BECAUSE THIS AWARD CONFLICTS WITH *STATE FARM*'S PROHIBITION AGAINST EXTRATERRITORIAL PUNISHMENT.

Question Two of the petition asks whether the Kentucky Supreme Court erred in affirming the trial court's refusal to instruct the jury that it could not impose punishment for out-of-state sales having no impact in Kentucky. *State Farm* answers: "A jury *must* be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred," slip op. at 11-12 (emphasis added), and as a "general rule" a jury may not impose punitive damages even for "unlawful" out-of-state conduct, *id.* at 11. The punitive verdict clearly reflects punishment for incidents outside of Kentucky, and thus, just as clearly, is unconstitutional under *State Farm*.

Respondents offer three unpersuasive reasons why extra-territorial punishment did not occur here. First, respondents say that they, unlike the plaintiffs in *State Farm*, made only *de minimis* references to out-of-state conduct. Opp. 6. Not so. Respondents elicited numerous nationwide statistics from Ford's witnesses[1] and relied heavily on those statistics in closing. Tape 15, 16:53:57 ("Mr. Carr has told us here today that there's 6.5 or 7 million of those transmissions, C6 transmissions—and, by the way, we believe there are a lot more transmissions involved with this same Ford design."); *id.* at 16:55:14 ("We won't have to worry about those millions and millions of vehicles already on the road that are backing up and running over people and causing death and destruction"); *id.* at 16:56:28 ("How many of those incidents were reported? More than 23,000 * * * How many people were killed, allegedly? In the hundreds."); *id.* at 17:04:17 ("Why didn't Ford Motor Company go back and do something on those 6.5 or 7 million trucks and cars and Lincolns and so forth that have this transmission? * * * [S]end a message to Ford Motor Company, and if other companies are doing it, to them also. The message will be: If you put a dangerous product on the highways, you're going to pay for it."). This case may not involve "days of testimony" concerning out-of-state conduct, Opp. 7, but the jury heard, and was urged to punish, on the basis of such testimony; that it fills fewer record pages here than in *State Farm* does not render reliance on it for forbidden purposes any less problematic.

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[1] While the nationwide statistics upon which respondents relied came from Ford witnesses, most of the testimony was elicited by respondents on cross-examination over Ford's constitutional objections. Tape 14, 15:40:12-15:41:08. The only time Ford elicited such testimony, *see* Opp. RA-4, it showed that, as of 1972, Ford was aware of only 42 reports of mis-shifts out of "several million" vehicles. *Id.*; Tape 11, 15:11:45. That evidence was simply offered to show that Ford investigated *all* 42 of the reports to determine the possible causes of mis-shifts. *Id.* at 15:12:54. As discussed *infra*, Ford is not challenging the admissibility of the statistics, some of which were relevant to issues other than punishment.

Second, respondents insist that the jury here relied on evidence of out-of-state conduct, not to punish, but only to assess Ford's "reprehensibility." Opp. 8-9. Yet this distinction is, at best, a "subtle one that is not easily appreciated by a lay jury," Pet. 17, which is exactly why the jury "must" be instructed concerning extraterritorial conduct, *State Farm*, slip op. at 11. Nowhere is the need for an instruction more evident than in cases involving standardized products, which almost invariably move through the stream of nationwide commerce. Pet. 20-21. Punishment for nationwide product sales very much "creates the possibility of multiple punitive damages awards for the same conduct." *State Farm*, slip op. at 12. In any event, respondents' characterization of their use of the out-of-state evidence at trial is decidedly incomplete. All within the span of only a few minutes, the jury was told to "send a message" to "Ford" and "other companies" about all the "millions and millions" of vehicles on the road and all the nationwide "incidents" and "deaths" Ford had supposedly caused. That is exactly what *State Farm* proscribes.

Third, respondents invoke the "invited error" doctrine, arguing that Ford put extraterritorial conduct into issue when it sought to introduce evidence concerning NHTSA's investigation and decision not to order any safety-related recall. Opp. 11. Ford put NHTSA's actions into evidence, however, for the unquestionably relevant purpose of showing that it had not acted with "malice," and thus could not be punished, under Kentucky law. It was respondents—not Ford—who insisted that they should be allowed to explore the full extent of the extraterritorial sales and incidents NHTSA examined. But the question of who opened the door to the evidence of extraterritorial conduct is beside the point in any event. The issue is not whether that evidence should have been admitted; it is whether the jury should have been allowed to punish Ford for its extraterritorial conduct based on that evidence. By allowing respondents to *use* evidence of out-of-state conduct to urge *punishment*, and by refusing to give the instruction Ford requested—and that *State Farm* requires—the court

allowed the jury to punish Ford for allowing supposedly unsafe vehicles to remain on the roads of other States.[2]

II. GVR IS REQUIRED BECAUSE THE JURY INSTRUCTIONS DID NOT CONSTRAIN THE JURY'S DISCRETION TO PUNISH FORD.

The court below held that adherence to Kentucky's tradition of bare bones instructions satisfied due process. GVR is warranted in light of *State Farm*'s reaffirmation that "[v]ague instructions" facilitate excessive punishment. Slip op. at 11.

Respondents concede that due process requires that the jury's discretion be "exercised within reasonable constraints." Opp. 12 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991)). They contend, though, that the instructions in this case were sufficiently "detailed and tightly drawn." *Id.* at 13. But "detailed" and "tight" instructions are not the same as those that constrain the jury's discretion. As respondents' comparison between the instructions given here and those upheld in *Haslip* reveals, the instructions here may have contained the same number of words, but they did not include the same (or any) constraints. The "factors" the jury considered were reasons to inflate the award. Not one informed the jury—as did the instructions approved in *Haslip* and required by many courts since—that it could impose damages only for the purpose of punishing and deterring the conduct that injured the plaintiff.

Respondents' further suggestion that the failure to provide such an instruction was harmless because arguments of counsel were an adequate substitute is refuted by this Court's

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[2] Respondents suggest in passing that the trial court's errors "should be regarded as harmless" because the Kentucky Supreme Court "cured" them by conducting *de novo* review of the $20 million award and reducing it to $15 million. Opp. 10. The suggestion is frivolous: the Kentucky Supreme Court did not even address Ford's argument that the jury award was impermissibly based on extraterritorial conduct (although it was properly presented to that court, *see Adams v. Robertson*, 520 U.S. 83, 86 (1997)), much less "cure" the problem Ford was—and is—raising.

precedents, *see* Pet. 12-13, and also by the respondents' actual trial argument. Respondents told the jurors that, under the court's instruction, they could award any amount, even $500 million. *Id.* at 5. Respondents' claim that the selfsame instruction was a constitutionally adequate constraint on the jury's discretion thus rings hollow. And the fact that Kentucky now, by statute, requires the instruction Ford was denied is no basis for ignoring the violation here. Opp. 17.

III. GVR IS REQUIRED BECAUSE *STATE FARM* SHOWS THAT THE COURT BELOW MISAPPLIED TWO OF THE THREE *BMW* GUIDEPOSTS.

The petition addresses the cavalier treatment of the three *BMW* guideposts by the court below. *State Farm*'s explication of two of those guideposts plainly warrants GVR here.

1. Question Three of the petition asks whether the $15 million punitive damages award below—which came on top of a $3 million compensatory damages award—is excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *State Farm* answers: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, slip op. at 15.

Respondents labor to justify the 5:1 ratio approved here by citing cases approving double-digit ratios. Opp. 24 n.16. But *State Farm* holds that a $1 million compensatory damage award is "substantial" enough to reduce the permissible ratio to 1:1 at the most. Slip op. at 18. If anything, a lower ratio is required here than in *State Farm*: Not only is the compensatory award three times as high,[3] but the "injury—physical in nature—[is] easy to detect." Pet. 26-27; *cf. State Farm*, slip

[3] Respondents suggest that the compensatory award is not "high" because Ford "never contested the size of that award." Opp. 25. But Ford has contested the size of the compensatory award throughout this appeal. The three dissenters below agreed, finding the $3 million award itself excessive by $2 million and the actual ratio to be 15:1. App. 32a-34a.

op. at 15 ("a higher ratio *might* be necessary where 'the injury is hard to detect'" (quoting *BMW*, 517 U.S. at 582)).

2. *State Farm* also exposes the error in the Kentucky Supreme Court's treatment of the third *BMW* guidepost. The court below flatly refused to analyze this guidepost in terms of the maximum $20,000 fine available in Kentucky (for felonious conduct) or the maximum $800,000 fine available at the time under federal law (for selling an entire nationwide fleet of defective vehicles), instead comparing the award only to jury awards in other cases—in other states no less—and in cases arising years and even decades after Ford made the design for which punishment was imposed. Pet. App. 19a & n.43. Respondents contend that this approach is consistent with *BMW*, Opp. 29, but *State Farm* conclusively refutes that claim, slip op. at 18 (comparing award only to Utah state civil sanction of $10,000 fine for fraud).[4]

IV. PLENARY REVIEW IS WARRANTED BECAUSE THIS CASE, LIKE *ROMO* AND *CLARK*, RAISES CRITICAL, RECURRING ISSUES REGARDING *BMW*'S REPREHENSIBILITY GUIDEPOST.

While *State Farm* clearly requires GVR here, plenary review is also appropriate because this case, like *Romo* and *Clark*, typifies the lower courts' recurring errors in applying the *BMW* reprehensibility guidepost to product liability and

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[4] Ford never argued that comparison to jury verdicts alone could satisfy the third *BMW* guidepost. Rather, *after* reviewing the comparable legislatively defined sanctions, *see* Opp. 28, *citing* Ford Br. at 51, Ford also observed that the punitive award was excessive compared to other Kentucky verdicts. Indeed, at the time of trial, the award was more than double all reported punitive awards approved on appeal in Kentucky combined. Pet. 30. (Ford's calculation did not include a bus accident case in Kentucky that, respondents say, involved "punitive damages of sorts." Opp. 28 n.18. As the journalist respondents cite for this "award" notes, that case was settled "without any finding of fault," let alone a punitive verdict, by a judge acting as a private arbitrator. James S. Kunen, RECKLESS DISREGARD 336 (1994).)

other cases involving activities beneficial to society that *also* necessarily create risks of injury and death.

The Kentucky Supreme Court found Ford's conduct "substantial[ly]" reprehensible *solely* because "Ford knew of the dangerous propensities of the C-6 transmission" but "continued producing and installing them." App. 17a. As the petition explains, that reasoning ignores that (i) consumer products, especially vehicles, inherently pose serious dangers; (ii) mere awareness of the dangers caused by a product does not make the product defective, much less worthy of punishment; and (iii) such "awareness" is most likely to be present in cases in which a manufacturer has made a good-faith attempt to balance competing safety risks, and other legitimate goals, in developing a product. Respondents themselves (like the respondents in *Romo*) unintentionally confirm the need for plenary review by repeating the error of the court below (and the courts in *Romo* and *Clark*): They liken to a "violent crime" Ford's knowing adoption of a product design that could (like virtually *all* product designs) cause injuries, Opp. 25, even though reasonable people could—and did—disagree about whether that risk of harm rendered the design defective.

Setting aside respondents' inflammatory accusations, the uncontroverted evidence shows that this case involves, at most, a genuine dispute over whether there was any alternative design that could significantly reduce the risk of misshifting without creating unacceptable countervailing disadvantages. Respondents confirm as much. They declare, for example, that Ford made "intentional decisions to do nothing for ten years" except to "count the dead * * * and pay off millions" instead of implementing "the design change" Ford's engineers considered in 1972. Opp. 22. But the uncontroverted evidence was that Ford engineers installed and tested an actual prototype transmission that incorporated this 1972 change, and found that it created a false sensation that could lead drivers to think the shift lever was locked in Park

when in fact it was mis-positioned between Park and Reverse, Tape 11, 15:33:21-15:40:03. Ford engineers thus rejected it as "a really bad idea." *Id.* at 15:40:03.

Respondent's simplistic assumption that Ford had no reasonable choice but to adopt "the design change" that it considered in 1972 is belied by the facts that (i) respondents never relied upon Ford's failure to adopt that change as evidence of reprehensibility in the courts below, and (ii) their own expert, Melvin Richardson, did not endorse that design change but proposed his own, completely different (and untested) solution. The evidence also showed there were reasonable grounds to conclude that Richardson's design would increase, not decrease, the risk of harm. Pet. 3. Apparently recognizing this, respondents make no serious attempt to defend Richardson's "solution" except to claim that Ford in 1980 made changes "along the lines" of Richardson's recommendation. But the changes Ford made in 1980 were not the changes Richardson recommended; on the contrary, Richardson testified that, even with those changes, the C-6 was still defective. Tape 13A, 9:50:43, 10:23:32, 14:10:10.

Respondents' inability even to identify the alternative design that was so clearly preferable to Ford's design that Ford had no reasonable choice but to adopt it is an objective indicator that there was—in fact—no such clearly preferable design. Even if the jury reasonably concluded that Richardson's untested concept was the better one, there plainly is a reasonable point of view to the contrary.

Indeed, *every* objective factor shows that this case involves, at most, genuine disputes over whether the C-6 design was defective and whether *any* of the alternative designs suggested at trial would reduce (or increase) the risk of harm. First, the performance of the C-6 transmission was comparable to other transmissions. In fact, Richardson admitted that he believed *every* pre-1980 automatic transmission was defective: "be it Ford, Chrysler or GM." Tape 13A, 14:01:26;

Tape 1, 14:16:52.[5] Respondents argue that, in some jurisdictions, compliance with industry standards does not preclude an award of punitive damages. Opp. 20 n.13. Many courts disagree, of course. Pet. 20 n.7. But respondents cannot reasonably deny—and nowhere address—that a manufacturer's compliance with industry standards is at least *relevant* to reprehensibility. The decision below, like many involving products (including *Romo*), refused to take those standards into account at all.

Moreover, the federal government thoroughly investigated the precise question of whether the "dangers" associated with mis-shifts in automatic transmissions, including C-6 transmissions, warranted a finding that those transmissions contained a safety-related defect. Pet. 6-7. NHTSA declined to find a defect and also determined that a recall would not reduce the number of park-to-reverse incidents, because such mis-shifts occur on all automatic transmissions. Tape 15, 14:58:22-14:59:10.

Indeed, NHTSA considered and rejected the very contentions respondents make in this Court. Respondents suggest that Smith's "death could have been avoided" if Ford had retrofitted Sand Hill's 1977 pickup truck with the "safer design changes" Ford installed in new vehicles in 1980, or if Ford had taken steps to notify owners of the dangers associ-

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[5] Respondents' unqualified claim that C-6 transmissions "experienced more park to reverse incidents than those of [Ford's] competitors," App. 12a (cited in Opp. 20), provides another example of how the facts in complex product liability cases can be manipulated to create an illusion of highly reprehensible conduct, when in fact the conduct is highly salutary. Respondents simply ignore, as if it did not exist, the undisputed evidence that Ford more actively solicited consumer complaints than its competitors, providing a reasonable basis for Ford to conclude that the disproportionate number of reports was not attributable to Ford's design but to its own thorough and conscientious investigation of the issue. Tape 14, 15:51:46-15:52:38. NHTSA made clear that "the alleged safety problem is not unique to Ford vehicles; rather it has been experienced on an industry-wide basis." Ford Ky. Ct. Apps. Br., Tab 9.

ated with mis-shifts. Opp. 26, n.17. But it is undisputed that Ford did send notices to all purchasers of vehicles containing C-6 transmissions of the dangers associated with mis-shifts. NHTSA found that "a recall campaign to mechanically alter a vehicle's transmission" by installing the 1980 design changes "would not reduce park-to-reverse incidents to *any greater degree than had already been accomplished* by [Ford's voluntary] notification warning label campaign." Tape 16, 14:58:22-14:59:10 (emphasis added).

Respondents argue that NHTSA's decision was "more an expression of exhaustion than exoneration." Opp. 20. But NHTSA's "exhaustion" resulted from "the largest and most difficult and complex investigation [it] ever conducted," *Center for Auto Safety, Inc. v. Lewis,* 685 F.2d 656, 663 (D.C. Cir. 1982)—an exhaustive investigation that would plainly not have been necessary if the matter were as free from doubt as respondents suggest. NHTSA refused to reopen its investigation on numerous occasions, and, by the time of trial, the investigation had spanned the course of four Presidencies. The "back-of-the-hand" treatment respondents accord the considered judgment of the federal government (like the same type of treatment accorded federal government conclusions in *Romo* and *Clark*) is directly contrary to *BMW,* where this Court held that the defendant's compliance with government standards provided reasonable grounds for the defendant to conclude its conduct was lawful and, therefore, decreased the defendant's reprehensibility. 517 U.S. at 578.

CONCLUSION

For the reasons stated, the Court should GVR in light of *State Farm* or, alternatively, grant plenary review of the petition.

April 22, 2003

Respectfully submitted,

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